(25,657)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 344.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH MAUCHER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1 No. 18721.

JOSEPH MAUCHER

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a Corporation.

Pleas before the Supreme Court of the State of Nebraska, at a Term Thereof Begun and Holden at the Capitol, in the City of Lincoln, in said State, on the 18th Day of September, 1916.

Present:

Hon. Andrew M. Morrissey, Chief Justice,
Hon. John B. Barnes, Judge,
Hon. Charles B. Letton, Judge,
Hon. Samuel H. Sedgwick, Judge,
Hon. Jacob Fawcett, Judge,
Hon. William B. Rose, Judge,
Hon. Francis G. Hamer, Judge.

Attest:

H. C. LINDSAY, *Clerk.*

Be it remembered, That on the 22nd day of July, 1914, there was filed in the office of the clerk of said supreme court a certain Præcipe, in the words and figures following, to-wit:

2 In the Supreme Court of the State of Nebraska.

JOSEPH MAUCHER, Appellee,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY Co., Appellant.

Præcipe.

To the Clerk of said Court:

Please docket the enclosed transcript of record as an appeal from a judgment rendered on the 18th day of April 1914 in a certain cause in the District Court of Douglas county wherein Joseph Maucher was Plaintiff and Chicago, Rock Island and Pacific Railway Company was Defendant.

You will designate the above named Chicago, Rock Island and Pacific Railway Co. as Appellants, and Joseph Maucher as Appellee.

Waiver of notice of appeal, and appearance filed herewith.

W. D. McHUGH,
W. H. HERDMAN,
Attorneys for Appellant.

Endorsed: General Number 18721. Supreme Court State of Nebraska. Joseph Maucher Appellee v. Chicago, Rock Island and Pacific Railway Co. Appellant. Præcipe. Supreme Court of Nebraska. Filed Jul- 22, 1914. H. C. Lindsay Clerk.

And on the same day there was filed in the office of the clerk of said supreme court a certain Transcript, in the words and figures following, to-wit:

3 Pleas before the Honorable A. C. Troup, one of the Judges and the Presiding Judge of the District Court of the Fourth Judicial District of the State of Nebraska, at a Term thereof within and for the County of Douglas, begun and held at the City of Omaha, on the 2nd day of February, A. D. 1914.

Be it remembered, That in a certain cause heretofore pending in the District Court of Douglas County State of Nebraska entitled Joseph Maucher vs. Chicago, Rock Island and Pacific Railway Company, a corporation appearing on Docket 127 No. 13 there was filed in the office of the Clerk of said Court on the 12th day of September, 1913, a certain Petition, which said Petition is in the words and figures following, to-wit:

Petition.

In the District Court of Douglas County, Nebraska.

JOSEPH MAUCHER, Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Petition.

Plaintiff, for cause of action against the defendant, shows to the Court as follows, to-wit:

1. That plaintiff now is and at all of the times hereinafter named was a resident and citizen of the state of New York.

2. That the defendant now is and at all of the times hereinafter named was a railroad corporation, owning and operating certain lines of railroad in the states of Nebraska and Iowa and elsewhere and conducting the general business of a railroad company including the transportation of passengers for hire.

3. That on the 12th day of August, 1913, plaintiff was tempo-

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rarily in the employment of a certain circus company known as the Barnum and Bailey circus, and as such employee of said
4 circus company, plaintiff was being transported as a passenger by the defendant from Lincoln, Nebraska, with destination at Atlantic, Iowa. The train upon which plaintiff was being carried as such passenger for hire by said defendant consisted in part of certain cars that were owned by said circus company and in part of a certain engine owned by the defendant, and said train was wholly in the charge of the defendant's servants, agents and employees composing the entire train crew thereof, which train crew consisted of a conductor, engineer, fireman, brakeman and flagman all in the employ of the defendant and controlling the movements and operation of said train.

4. That on said 12th day of August, 1913, at about one o'clock in the morning of said date, while this plaintiff was being carried by said defendant as a passenger as aforesaid on the railroad of said defendant, and while said train upon which plaintiff was such passenger was at or near the station of Richfield in Sarpy County, Nebraska, the said defendant by and through its servants, agents and employees, carelessly and negligently caused a collision to occur between a certain other train of the defendant operated by its servants, agents and employees, and known as the Denver Express, and the train upon which plaintiff was being carried as a passenger as aforesaid.

5. That in and by reason of said collision of said trains so caused by the negligence and carelessness of said defendant, the car in which plaintiff was then and there being carried as a passenger by said defendant, which said car was one of the cars of said circus company, was wrecked, demolished, destroyed and thrown from the tracks and this plaintiff was severely injured in his person in, by and through said collision in the following respects: Plaintiff suffered severe internal injury to his abdominal organs and severe physical and nervous shock to his entire system. Said internal injury to plaintiff's abdomen was of such a character that it necessi-
5 tated a very grave and serious abdominal surgical operation in which plaintiff's abdomen was cut open and certain operations made upon the organs within said abdomen, the precise nature of which plaintiff is unable to more specifically state; that said injuries caused plaintiff to suffer great physical pain and mental anguish and to be confined to a hospital for a long period of time and resulted in a permanent weakening and impairment of plaintiff's strength and health which said impairment will continue during the period of plaintiff's natural life.

6. That prior to and at the time of receiving said injuries, plaintiff was a strong robust man of the age of 32 years with a life expectancy of many years; that he was a cook by trade and able to earn large and remunerative wages by following said trade; that said injuries have entirely destroyed plaintiff's earning capacity and are of a permanent nature which will endure during his natural life and cause plaintiff great physical pain and mental anguish and compelled plaintiff to incur great expense on account of medical

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and surgical treatment, hospital care, nurse hire and medicines, and will continue to incur great expense to plaintiff for like services in the future, by reason of all of which plaintiff has been damaged in the sum of $50,000.00.

Wherefore, plaintiff prays judgment against the defendant in the sum of $50,000.00 and the costs of this suit.

MAHONEY & KENNEDY.
T. J. MAHONEY.

STATE OF NEBRASKA,
County of Douglas, ss:

Joseph Maucher, being first duly sworn on oath, deposes and says that he is plaintiff in the above entitled action; that he has read the foregoing petition and that the facts therein stated are true, as he verily believes.

JOSEPH MAUCHER.

6 Subscribed in my presence and sworn to before me this 11 day of September, 1913.

[SEAL.] CATHERINE DEE,
Notary Public.

Endorsed: Doc. 127 No. 13. In the District Court of Douglas County, Nebraska, Joseph Maucher, vs. Chicago, Rock Island and Pacific Railway Company, a corporation, Petition. Clerk's Fees $5.50 Paid by Mahoney & Kennedy. Filed In District Court Douglas County, Nebraska Sep. 12, 1913. Robert Smith, Clerk.

Afterward, on the 11th day of October, 1913, a Notice for Removal was filed herein, which said Notice is in the words and figures following, to-wit:

Notice for Removal.

In the District Court of Douglas County, Nebraska.

Doc. 127, No. 13.

JOSEPH MAUCHER, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Notice of Filing of Petition for Removal of Case to the United States District Court for the Southern District of the State of Iowa.

To Mahoney & Kennedy:

You are hereby notified that on the 11 day of October, 1913, defendant in above entitled cause will file its petition and bond for

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the removal of said cause to the District Court of the United States for the Southern District of the State of Iowa, and that said defendant will at 9:30 o'clock A. M., on the 13 day of October, 1913, or as soon thereafter as counsel can be heard, in Court Room No. 1, of the above named Court ask for entry of an order on said petition, removing said cause to the District Court of the United States for the Southern District of the State of Iowa.

W. D. McHUGH,
Att'y for Def't.

7 Rec'd copy of above notice Oct. 11, 1913.

MAHONEY & KENNEDY,
Att'y- for Pl'ff.

Endorsed: Doc. 127. No. 13. In the District Court of Douglas County, Nebraska. Joseph Maucher, Plaintiff, vs. Chicago, Rock Island & Pacific Railway Company, a corporation, Defendant. Notice of Filing of Petition for Removal of Case to the United States District Court for the Southern District of the State of Iowa. Clerk's Fees $.50 Paid by W. D. McHugh, Attorney for the Defendant. Filed In District Court Douglas County, Nebraska, Oct. 11, 1913. Robert Smith, Clerk.

Afterward, on the 11th day of October, 1913, a Petition for Removal was filed herein, which said Petition is in the words and figures following, to-wit:

Petition for Removal.

In the District Court of Douglas County, Nebraska.

Doc. 127, No. 13.

JOSEPH MAUCHER, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Petition for Removal to the United States District Court for the Southern District of the State of Iowa.

Your petitioner, Chicago, Rock Island & Pacific Railway Company, a corporation, respectfully shows:

1. That the above entitled action was commenced in said District Court on the 12th day of September, 1913, by plaintiff by filing in the office of the Clerk of said Court a petition and by service upon this defendant of a writ of summons; that said cause is still pending and undetermined, and that the term of said District Court to be

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begun and held in said City of Omaha in said County of Douglas on September 15, 1913, is the first term at which said case
8 may be tried, and that said case has not been tried, and that said defendant, Chicago, Rock Island & Pacific Railway Company has not answered or pleaded to plaintiff's petition, and is not required under the laws of this state or the rules of said District Court to answer or plead to the plaintiff's petition until the 13th day of October, 1913.

2. That this action is of a civil nature and that the matter in dispute in said controversy exceeds, exclusive of interest, and costs the sum of $3,000; that the plaintiff claims in his petition of this defendant the sum of $50,000 damages by reason of personal injuries sustained by said plaintiff and alleged to have been caused by this defendant.

3. That this action involves a controversy between citizens of different states; that the plaintiff, Joseph Maucher, was at the time of the commencement of this case, and at all times since has been and now is a citizen and resident of the state of New York, and not a citizen or resident of the state of Illinois or of the state of Iowa. That defendant, Chicago, Rock Island & Pacific Railway Company was at the time of the commencement of this case, and ever since has been and now is a corporation duly organized and existing under the laws of the states of Illinois, and Iowa, having its principal place of business in the city of Chicago, in said state of Illinois, and was at the time of the commencement of this action, and ever since has been and now is a resident and citizen of the states of Illinois and Iowa, and not a citizen and resident of the state of New York.

That the United States District Court for the Southern District of Iowa is the proper District to which this cause should be removed.

9 Your petitioner offers herewith a bond with good and sufficient surety for entering in the District Court of the United States for the Southern District of the State of Iowa, within 30 days from the date of the filing of this petition a certified copy of the record of this suit, and for paying all costs that may be awarded by the District Court if said Court shall hold that said suit was wrongfully or improperly removed thereto, and also for its appearance and entering special bail in said suit, if special bail was originally requisite therein.

Wherefore your petitioner prays that this case may be removed into the District Court of the United States for the Southern District of the State of Iowa, and that this Court proceed no further therein.

WILLIAM D. McHUGH,
Attorney for Defendant.

STATE OF NEBRASKA,
County of Douglas, ss:

W. D. McHugh, being duly sworn upon his oath deposes and says that he is the attorney for the above named Chicago, Rock

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Island & Pacific Railway Company, and as such is duly authorized to make this affidavit.

That he has read the foregoing petition, knows the contents thereof, and that the averments and allegation- therein contained are true, as he verily believes.

W. D. McHUGH.

Subscribed in my presence and sworn to before me this 11 day of October, 1913.

[SEAL.] W. H. HERDMAN,
Notary Public.

10 Endorsed: Doc. 127, No. 13. In the District Court of Douglas County, Nebraska. Joseph Maucher, Plaintiff, vs. Chicago, Rock Island & Pacific Railway Company, a corporation, Defendant. Petition for Removal to the United States District Court for the Southern District of the State of Iowa. Clerk's Fees $2.50, Paid by W. D. McHugh, Attorney for Defendant. Filed in District Court Douglas County, Nebraska, Oct. 11, 1913. Robert Smith, Clerk.

Afterward, on the 11th day of October, 1913, a Bond for removal was filed herein, which said Bond is in the words and figures following, to-wit:

Bond for Removal.

In the District Court of Douglas County, Nebraska.

Doc. 127, No. 13.

JOSEPH MAUCHER, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Bond for Removal.

Know all men by these presents: That the Chicago, Rock Island & Pacific Railway Company, a corporation organized and doing business under and by virtue of the laws of the states of Illinois and Iowa, as principal, and American Surety Company, of New York, as surety, are held and firmly bound unto Joseph Maucher in the penal sum of $500, for payment of which well and truly to be made unto said Joseph Maucher and his heirs, executors, and administrators, said Chicago, Rock Island & Pacific Railway Company and American Surety Company bind themselves, their heirs, executors, administrators, successors and assigns, firmly by these presents:

The condition of the above obligation is such that

Whereas, the said Chicago, Rock Island & Pacific Railway Com-

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pany has petitioned the District Court of Douglas County,
11 Nebraska, for the removal of a certain case pending therein, wherein Joseph Maucher is plaintiff, and said Chicago, Rock Island & Pacific Railway Company is defendant, to the District Court of the United States for the Southern District of the State of Iowa.

Now, if said Chicago, Rock Island & Pacific Railway Company shall enter in the District Court of the United States, for the Southern District of the State of Iowa, within 30 days from the date of filing of said petition for said removal, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, and shall then and there enter special bail in said action if the same was originally requisite therein then this obligation to be void; otherwise to be and remain in full force and effect.

In witness whereof the said parties have hereunto set their hands this 4th day of October, A. D. 1913.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
By WILLIAM D. McHUGH, *Its Attorney.*
AMERICAN SURETY COMPANY OF NEW YORK,
By PHILIP POTTER,
Resident Vice-President.

Attest:

[SEAL.] FREDERICK J. BURNETT,
Resident Assistant Secretary.

Endorsed: Doc. 127. No. 13. In the District Court of Douglas County, Nebraska. Joseph Maucher, Plaintiff, vs. Chicago, Rock Island & Pacific Railway Company, a corporation, Defendant. Bond for Removal. Clerk's Fees $1.00. Paid by W. D. McHugh, Attorney for Defendant. Filed in District Court Douglas County, Nebraska, Oct. 11, 1913. Robert Smith, Clerk.

12 Afterward, at the September term of said Court, and on the 16th day of October, 1913, an Order was entered herein, as appears on Page 303 Journal 137, as follows, to-wit:

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Order.

127-13.

JOSEPH MAUCHER, Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Order.

Now on this 16th day of October, 1913, this cause having come on this day to be heard on the petition of the defendant for a removal of this cause into the District Court of the United States for the Southern District of Iowa, and the Court having examined the said petition and bond tendered therewith and heard the arguments of counsel and being fully advised in the premises, finds as follows:

1. That the surety whose name is attached to said bond as surety thereon is of sufficient solvency.

2. That the said petition for removal is not such a petition as is contemplated by law, in that it does not pray for a removal of said cause into the United States District Court of the District where said cause is pending.

3. That the bond tendered is not such a bond as is required by law, in that it is not conditioned for the entering of the record of said cause in the United States District Court for the District where said cause is pending and is not conditioned for the payment of such costs as may be adjudged against the defendant by said Court in the event that said Court should hold that said cause is improperly removed.

4. That said defendant is not entitled to a removal of said cause into the United States District Court for the Southern District of Iowa.

13 It is therefore considered and ordered by the Court:

1. That the said bond tendered by the defendant for a removal of said cause into the United States District Court for the Southern District of Iowa be and hereby is disapproved and not accepted by this Court.

2. That the said petition of said defendant for a removal of said cause into the United States District Court for the Southern District of Iowa be and the same is hereby denied.

To each of the aforesaid findings and orders of the Court the defendant excepts.

By the Court:

A. C. TROUP, *Judge.*

Afterward, on the 30th day of October, 1913, an Answer was filed herein, which said Answer is in the words and figures following, to-wit:

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Answer.

In the District Court of Douglas County, Nebraska.

JOSEPH MAUCHER, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Answer.

Comes now the defendant above named and for its answer to plaintiff's petition filed herein, says:

I.

That it admits the allegations contained in paragraphs one and two of plaintiff's petition; admits that on September 12, 1913, plaintiff was in the employ of a circus company, known as Barnum & Bailey Shows; admits that the train upon which plaintiff was riding at the times alleged in its petition started from Lincoln,
14 Nebraska, and was bound for and destined to Atlantic, Iowa; admits that plaintiff entered said train at Lincoln, Nebraska, to be transported therein to Atlantic, Iowa; admits that the train upon which plaintiff was riding was made up in part of cars owned by said Barnum & Bailey Shows, and in part of an engine owned by this defendant; admits that a collision occurred at or near Richfield, Sarpy County, Nebraska, between the said train upon which plaintiff was riding and a certain train known as the Denver Express, owned and operated by this defendant.

II.

This defendant specifically denies that at the time of said collision and consequent injury to the plaintiff, if he was injured, plaintiff was being transported by this defendant as a passenger for hire or in any other capacity, and in that behalf, alleges the fact to be, as will be hereinafter more specifically set forth, that at said time said plaintiff was being transported by said Barnum & Bailey Shows; defendant specifically denies that the train upon which plaintiff was riding at the time of said collision and at the time at which he received his injuries, if any he did receive, was in charge of this defendant or its agents, servants and employees, or was being operated by or was in control of this defendant or its agents, servants and employees.

III.

And further answering said petition, this defendant says that it has no sufficient knowledge or information herein to form or base

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an opinion or belief as to whether, in fact, plaintiff was injured as alleged in his said petition, or the nature and extent of injuries received by plaintiff, if any such injuries were received, and therefore denies the same.

15 IV.

And further answering said petition this defendant denies each and every allegation therein contained, not hereinbefore specifically admitted to be true.

V.

Further answering, this defendant says that Albert Ringling, Alf T. Ringling, Charles Ringling, John Ringling and Henry Ringling are co-partners doing business under the firm name and style of Barnum & Bailey Shows and Barnum & Bailey, and are engaged in the circus or show business and as such have a large number of employees and own a circus caravan and menagerie and other property used and useful in their said business, and also own a large number of cars fitted up for the carriage and transportation of its employees and property, and in which all its said employees and property are moved from place to place for exhibition.

VI.

That on June 5th 1913 at Chicago, Illinois, a written contract and agreement was made and entered into by and between this defendant and said Ringlings, contracting under the name and style of Barnum & Bailey Shows, whereby it was contracted and agreed, among other things, that this defendant should furnish to and for the use of said Barnum & Bailey Shows, the necessary locomotive engines, with necessary fuel therefor, engineers, firemen, and other employees, and the right to use defendant's tracks for the transportation of the said circus coaches, employees, and equipment, of said Barnum & Bailey Shows from, between, and to the points named in said contract, including the transportation of same on August 11 and 12, 1913, from Lincoln, Nebraska, to Atlantic, Iowa; that in said contract, this defendant is named as party of the first part, and Barnum & Bailey Shows as party of the second part, and said contract expressly stipulated as follows:

16 "It is expressly agreed and understood that this agreement is not made by the first party as a common carrier, but only as a hiring of said locomotives, engines and employees, and the use of its railroad to the second party, for the purpose of enabling the second party to move said train between said points; that all of the said cars, coaches and trains shall be operated under the management, directions, orders and control of the second party or its agents."

"It is expressly understood and agreed that all engineers, firemen, conductors, brakemen, train despatchers and other operators and employees, furnished by the first party, are, in the operation and movement of said cars, coaches and trains, exclusively the employees

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of the second party, but all of said cars, coaches and trains shall be run according to the rules, regulations and time cards of the first party."

"It is expressly understood and agreed, in consideration of the first party hiring the use of its railway and furnishing the motive power and employees to handle the second party's cars, coaches, paraphernalia and employees, as aforesaid, and for less than it would receive if it handled said circus cars, paraphernalia, menagerie and employees, as regular freight and passengers upon its cars, and in consideration of the privilege of stopping over at the points hereinbefore designated, that the first party shall not be responsible or liable to the second party, or to any other person, partnership or corporation for any delay of any cars or trains, however caused, and whether or not arising in any way from anyone's fault or negligence, of or for any loss, damage or injury to the property or person of the second party or of anyone employed by the second party, or being upon any trains or cars, hauled under this agreement or being upon any premises of the first party or connect- in any way with said circus, caravan or menagerie, or with the business of the second party, or for any loss of or damage or injury to the property or person of anyone else, or of any partnership or corporation whatsoever, whether or not any such loss, damage or injury arises in any way from, or is in any degree attributable to, any fault or negligence of the first party or any of its officers, agents or employees, in or about the performance of this agreement, or the performance of the first party's general business or in connection with the railroad or property or any duty whatsoever of the first party."

"The second party further agrees and undertakes, as a further consideration hereof, that in case of delay, loss, damage or injury, to the person or property, either of the second party or any other persons, association of persons or corporation, carried or to be carried upon any of the cars or trains herein specified or employed on or about or in connection with the same on the business of the second party, it, the said second party, will release and does hereby release the first party from all liability or claim therefor for loss, damage or injury to itself or its business or property, will indemnify and forever save harmless the first party from all claim, demand, actions, causes of action, costs, judgments and expenses, including attorney's fees, resulting from or growing out of such delays, loss, damage or personal injury, the second party hereby assuming and agreeing to defend at its own cost all such claims, demands and actions, and to satisfy and pay the same, and the second party further undertakes and agrees to inform by personal notice, to each thereof, all of the persons permitted by the second party to be carried on any of
17 said cars, coaches and trains, under the terms of this agreement, and to advise and notify all such persons, and each thereof, that they are carried by the second party and not by the first party, and that the first party has not assumed, with respect to them or their baggage or other personal property, any of the duties and responsibilities of a carrier of passengers."

"It is a further consideration of this agreement, and the parties

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hereto agree, that the second party is to have sole charge of every person and of all animals and property on any car, coach or train hauled under said agreement, and the first party does not assume, and shall be under no responsibility for the safety of any of the cars, coaches, persons, animals or property on said cars, coaches and trains, in charge of the second party, or of advance agents, from any cause whatever, and the second party agrees to, and does hereby indemnify and save harmless the first party against all loss, damage or injury on account of strangers, tramps, or others riding on said cars, coaches or trains, and being injured or killed, or on account of strangers, tramps or other persons being injured or killed in the operation of said cars, coaches or trains, or in the handling, loading or unloading of cars, and will protect the first party from damages, and cost incident thereto, suffered by anyone from wild, tamed or domesticated animals escaping from cars or custody, and protect the first party against all loss, damage and cost for and on account of the spread or transmission of any disease to persons or animals from unloading offal or otherwise, and against any fine or penalty arising therefrom, which may be imposed against the first party by any state, municipality or other competent authority."

A true and correct copy of said contract being duly attached hereto, and marked Exhibit "A," and each and every provision of said contract is hereby referred to and made a part of this answer; that said contract stipulated, among other things, that this defendant should haul three advertising coaches, carrying certain persons employed by said Barnum & Bailey Shows, as advance advertising agents, but in that behalf, this defendant alleges that said advertising coaches were not in or a part of the train upon which plaintiff was riding at the time he alleges that he was injured and that plaintiff at the time he alleges he was injured, was not riding in or upon said advertising cars or in and upon a train transporting said advertising cars. That the said contract was made and executed in the State of Illinois, and was and is a valid and binding contract under the laws of the said state.

VII.

That said Barnum & Bailey Shows exhibited their said cir-
18 cus and menagerie at Lincoln, Nebraska, on August 11, 1913, and in the night-time of said day loaded their said circus, menagerie, property, performers, and employees on and into the coaches, box cars, stock cars, and flat cars referred to in said contract, "Exhibit A" hereof, for the purpose of transporting same from said Lincoln, Nebraska, to Atlantic, Iowa, and at the same time this defendant, pursuant to the requirements, stipulations, and agreements in said contract, Exhibit "A" hereof, furnished to and for the use of said Barnum & Bailey Shows the necessary locomotive engine, with the necessary fuel therefor, and engineer, firemen, and other employees for the transportation of said coaches, cars, circus, menagerie, performers, and employees, to Atlantic, Iowa; that the plaintiff entered said train so made up, at Lincoln, Nebraska, and

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rode thereon as an employee of said Barnum & Bailey Shows, and was riding thereon as such employee at the time the collission, referred to in his petition, occurred, by reason of which he alleges he was injured as set forth in his petition; that said plaintiff had not paid or tendered to this defendant fare or compensation for his carriage on said train, nor had he agreed to pay this defendant for same; that his right to be upon said train was secured to him and to said Barnum & Bailey Shows by the contract Exhibit "A" hereof and said plaintiff entered said train and was riding thereon in pursuance of said contract and not otherwise, and the only compensation this defendant was to receive for the transportation of said train, cars, circus, menagerie, performers and employees over its tracks and for the use of its engine and necessary fuel therefor and services of its engineer, firemen and other employees was the consideration stipulated in said contract, Exhibit "A" hereof, and said compensation was to be paid by said Barnum & Bailey Shows under said contract for the privileges and rights granted thereby to said Barnum & Bailey Shows; that this defendant furnished said
19 locomotive engine, fuel, engineer, firemen, and other employees and the right to use its tracks for the transportation of said train, cars, circus, menagerie, performers, and employees, from Lincoln, Nebraska, to Atlantic, Iowa, under and in pursuance to the stipulations and agreements in said contract Exhibit "A" hereof and said train, so made up, was moved, run and operated under the management, directions, and control of said Barnum & Bailey Shows, and was so being moved, run, and operated and controlled at the time the collision referred to in plaintiff's petition, occurred, and not otherwise.

And at all times said train was made up, moved and operated upon and over the tracks of this defendant, pursuant to the provisions of said contract, Exhibit "A" hereof, and not otherwise.

VIII.

That at Detroit, in the State of Michigan, on June 9, 1913, the plaintiff herein, in consideration of his employment by Robert Ringling, Alf T. Ringling, Charles Ringling, John Ringling and Henry Ringling, co-partners, doing business under the firm name of Barnum & Bailey, entered into a certain contract and agreement, whereby said plaintiff covenanted and agreed as follows:

"Now therefore, for valuable consideration, and in consideration of this employment, and the furnishing by first party to second party of transportation and board of the kind customary and usual in the circus business, and in consideration of special personal benefits and advantages beyond the scope of employment inuring to second party herein, the second party accepts and assumes the increased hazard of railroad travel and circus service in all particulars and circumstances and hereby exempts and releases first party from all claims for injuries, accidents, sickness and damages of whatever nature sustained in said service, whether due to negligence (including gross negligence) of first party, their employees, agents or bosses,

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or the negligence of any employee or agent of any railroad company transporting first party, when said second party is traveling on or using transportation furnished by any railway company under contract with first party; and second party, recognizing said privity in railroad transportation, hereby renounces his rights as "passenger" in traveling on any railroad line while in said service, and releases all such railroad companies from claim on his part for any damage or injury whatsoever; and second party agrees to protect, indemnify and hold harmless first party and to pay to first party (and when notified to personally assume payment of) all sums
20 which first party may be subject to pay in consequence of and claim by, or injury, sickness or death to, second party; and second party hereby releases first party from any claim he may in the future have due to or growing out of any injury received in said service either as against first party or any railroad company, hereby binding himself, his heirs, executors and assigns firmly by these presents."

That the plaintiff and "Jos Mauchard" who signed said contract, are one and the same person; that said contract was and is a valid contract under the laws of the State of Michigan; that by said contract plaintiff for consideration therein named covenanted and agreed to accept and assume the increased hazard of railroad travel, and released any and all railroad companies on and over whose lines the circus and shows therein referred to were transported, from claim on his part for any damage or injury whatsoever, that by reason of said contract of employment and the stipulations and covenants therein contained, the said plaintiff has released this defendant from any and all liability for and on account of the matters and things alleged in said petition. A true and correct copy of said contract being hereto attached and marked Exhibit "B" and made a part hereof.

IX.

a. Defendant further alleges that the said plaintiff did not have, acquire or purchase any ticket from this defendant entitling him to be transported by this defendant from Lincoln, Nebraska, to Atlantic, Iowa, or for any portion of said journey, and did not at any time tender to any official or employee of this company, any money whatever as the fare for transportation of the said plaintiff by this defendant from Lincoln Nebraska to Atlantic Iowa or for transportation of any portion of said distance. On the contrary, this defendant alleges that the said plaintiff entered the car of the said Albert Ringling, Alf T. Ringling, Charles Ringling, John Ringling and Henry Ringling co-partners doing business as Barnum & Bailey Shows and Barnum & Bailey at Lincoln Nebraska to be
21 transported on said car with other employees and property of the said firm of Barnum & Bailey from Lincoln Nebraska to Atlantic Iowa. That the said plaintiff and the said cars and the other employees and property of said Barnum & Bailey were being transported from Lincoln Nebraska to Atlantic Iowa

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at the time said plaintiff received the alleged injuries set forth in the petition herein; that said plaintiff and the said cars and employees of the said Barnum & Bailey were being transported from Lincoln Nebraska to Atlantic Iowa as aforesaid, under and in pursuance of the contracts hereinabove mentioned, and solely and only under and pursuant to the said contracts.

b. Defendant further alleges that inasmuch as said transportation being from Lincoln Nebraska to Atlantic Iowa was interstate transportation, the validity of the said contracts and their construction and effect are to be determined solely by the legislation of the United States respecting interstate commerce and the carrier thereof, and the public policy of the United States respecting interstate carriers of interstate transportation as evidenced by the legislation of the United States and the decisions of the courts of the United States, relating to such carriers and transportation. In this respect, this defendant alleges that under the laws and public policy of the United States relating to interstate carriers and interstate transportation, said contracts are valid and binding and constitute a defense to this action; that the Interstate Commerce Commission of the United States on March 18th 1907, issued its Conference Rule Number 63 Tariff Circular 18 A as Follows:

"Transportation of Circus Outfits.—The act to regulate commerce, as amended June 29, 1906, applies to the transportation of circuses and other show outfits, but the Commission recognizes the peculiar nature of this traffic and the difficulty of establishing rates thereon in advance of shippers' request describing the character and volume of the traffic offered, and has therefore entered a general order authorizing carriers to establish rates on circuses and other show outfits by tariff, to become effective one day after filing thereof with the
22 Commission and relieving them from the duty of posting such tariffs in their stations. Such tariff may consist of a proper title-page reading "as per copy of contract attached", and to it may be attached a copy of the contract under which the circus is moved. As far as practicable general rules or regulations governing the fixing of such rates should be regularly published and filed".

This defendant alleges that the said Conference Ruling is still in force and effect.

c. This defendant further alleges that on July 21st 1913 pursuant to said conference ruling, said defendant duly issued and filed with the Interstate Commerce Commission, its certain rate notice in words and figures following, to-wit:

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"Chicago, Rock Island & Pacific Railway.

Rate Notice No. B-1636.

Local Freight Tariff
on
Circus Outfit
of
Barnum & Bailey Shows
between
Points on the C., R. I. & P. Ry.

Issued July 21, 1913. Effective August 2, 1913.

(Expires with Movement.)

(Issued under authority of Rule 63 of I. C. C. Tariff Circular 18-A.)

Shipment will be handled and charged as per attached Contract No. C-136.

In filing contract, the C., R. I. & P. Ry. reserves its legal right to insist that it is not, and never has been, a common carrier of circus or show property, and in its regular course of business, as well as under the terms of the contract filed herewith, does not incur any liability as a common carrier thereunder.

Issued by

J. C. LA COSTE,
C. T. B., C., R. I. & P. Ry., Chicago, Ill.

H. GOWER,
F. T. M., C., R. I. & P. Ry., Chicago, Ill.

(L. M. F.—10—K.)

attached to which said rate notice, was the contract therein mentioned as contract Number C-136, the same being the contract, a copy of which is attached to its answer as exhibit "A".

d. This defendant therefore claims that under the laws and public policy of the United States relating thereto, and which solely determine the validity, construction and effect of the said contracts, the said contracts are valid and binding and constitute a defense to this action. And this defendant pleads and relies as a defense to
23 this action, upon the said contracts and the laws and policy of the United States in relation to interstate transportation, and the carriers thereof, under which laws and public policy the said contracts are valid and binding and constitute a defense to this action.

X.

And further answering said petition, this defendant says that the engineer, fireman, brakemen, flagman, conductor and other em-

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ployees in charge of and operating the said train and cars belonging to said Barnum & Bailey Shows, and upon and in which plaintiff was riding as aforesaid at the time he alleges he was injured, were, in the movement and operation of said train and the transportation of the property and persons thereon including the plaintiff, the employees of said Barnum & Bailey Shows and not the employees of this defendant; that is to say, this defendant furnished said engineer, fireman, brakemen, flagman, conductor and other employees to said Barnum & Bailey Shows under and pursuant to the requirements and stipulations of the contract, Exhibit "A" of this answer, and that in said contract it is expressly recited, stipulated and agreed as follows:

The first party agrees to furnish to and for the use of the second party * * * the engineers, firemen and other employees * * * for the transportation of said circus, menagerie, employees and employment of the second party by train * * * from * * * Lincoln, Nebr., to Atlantic".

"It is expressly understood and agreed that all engineers, firemen, conductors, brakemen, train dispatchers and other operators and employees, furnished by the first party, are, in the operation and movement of said cars, coaches and trains, exclusively the employees of the second party, but all of said cars, coaches and trains shall be run according to the rules, regulations and time cards of the first party".

That at said time, that is to say at the time said train was being moved and operated by said employees, on the track and lines of this defendant, from Lincoln, Nebraska, toward and with destination at Atlantic, Iowa, pursuant to said contract Exhibit "A" and
24 while plaintiff was riding as aforesaid on said train and at the time plaintiff alleges he was injured, there was, and for a long time prior thereto had been in full force and effect and applicable on the lines of this defendant in the states of Nebraska and Iowa, and applicable to and governing the operation and movement of said train from Lincoln, Nebraska, to Atlantic, Iowa, which said rules are as follows:

"99. When a train stops or is delayed under circumstances in which it may be overtaken by another train, the flagman must go back immediately with stop signals a sufficient distance to insure full protection. One-fourth mile from the rear of the train he will place one torpedo on the rail, continuing back three-fourths mile from the rear of the train, he will place two torpedoes on the rail two rail lengths apart. During foggy or stormy weather, or in the vicinity of obscure curves or descending grades or if other conditions require it, the flagman will increase the distance, placing two more torpedoes, two rail lengths apart, at the farthest point reached. He may then return to the single torpedo, where he must remain until relieved by another f*al*gman or is recalled. When recalled but not before, if he does not see or hear an approaching train, the single torpedo will be removed. In stormy or foggy weather, or if the view for at least one-fourth mile to the rear of the train is not clear, or if other conditions warrant, he will leave a burning red fusee to protect the train while returning.

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Should a train be seen or heard approaching before the flagman has reached the required distance, he must, at once, place one torpedo on the rail, and, if by night or during foggy or stormy weather, display a burning red fusee, continuing in the direction of the approaching train.

If the flagman is recalled before reaching the required distance, he will, before returning, place two torpedoes on the rail, two rail lengths apart, and a sufficient distance from the train to protect it while he is returning.

When it is necessary to protect the front of a train, or if any other running track is seen to be unsafe or obstructed, the same precautions shall be observed.

If for any reason an engineman finds it necessary to stop between stations, he will sound the whistle signal (14-*c*) and, whenever possible, stop where there is a clear view of the rear of the train for a distance of at least one-fourth mile. If it be a freight train, the front brakeman, or in his absence, the fireman will also give the signal (12-*c*) from the front of the train until the like signal is returned from the rear of the train.

99*b*. Should the speed of a train be reduced and its rear thereby endangered, making it necessary to check a following train before a flagman can get off, a burning fusee shall be thrown off at intervals to insure safety".

That said rules or regulations, and the requirements thereof, were well known to the said employees operating, moving and in control of said trains; that notwithstanding the requirements of said rules, and knowing that their train was in danger of being overtaken from the rear, by a train operated by this defendant, the said employees, as they reduced the speed of, or stopped, their train preparatory to taking the siding at Richfield Station, carelessly and negligently failed and neglected to send a Flagman, or any other person, back from the rear of their train with or without stop signals to protect the rear of their train from the train operated by this defendant, and failed and neglected to place any torpedo or torpedoes on the rails to the rear of their train, or to place any fusees on the track to the rear of their train; that said employees failed and neglected, at said time, to comply with any of the requirements of said rules; that by reason of the said negligence of said employees, the train operated by this defendant, and approaching from the rear, ran into and collided with the rear of their said train whereby plaintiff sustained the injuries, if any, alleged in his petition; that the said negligence of said employees concurred with the negligence, if any, of this defendant in causing said injuries to plaintiff; that said plaintiff, without reserving his rights, if any against this defendant, by the contract hereinbefore mentioned, and set out as exhibit "B" of this answer, and for the consideration therein expressed, duly released said Barnum & Bailey Shows and the proprietors thereof from all liability for the injuries set forth and alleged in his petition herein, that is to say: by the said contract, the plaintiff released said Barnum & Bailey Shows and the proprietors thereof from "all claims for injuries, accidents, sickness or damages of what-

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ever nature sustained in said service, whether due to negligence (including gross negligence) of first party, their employees agents or bosses, or the negligence of any employee or agent of any
26 railroad company transporting first party, when said second party is traveling on or using transportation furnished by any railway company under any contract with first party" and "releases first party from any claim he may in the future have due to or growing out of any injury received in said service either as against said first party or any railway company"; that by the said release, this defendant is discharged of and from any and all liability for and on account of the matters and things set forth and pleaded in the petition herein.

Wherefore, defendant, having fully answered plaintiff's petition, prays that it may be dismissed without delay and with its costs herein expended.

W. D. McHUGH,
Att'y for Defendant.

STATE OF NEBRASKA,
County of Douglas, ss:

W. D. McHugh being duly sworn says that he is attorney for the defendant in the above entitled action; that said defendant is a corporation; that he has read the foregoing answer, knows the contents thereof, and the facts therein stated are true as he verily believes.

W. D. McHUGH.

Subscribed in my presence and sworn to before me, this — day of October, 1913.

[SEAL.] FANNIE M. PRATT,
Notary Public.

Contract C-136.

This Agreement, Made and entered into this Fifth day of June A. D. 1913, at Chicago, Ill. by and between the Chicago, Rock Island & Pacific Railway Company, first party, and Barnum & Bailey Shows second party.

27 Witnesseth:

Whereas, The second party is the owner of a circus, caravan and menagerie, including horses, wild animals and other articles usually used in connection with and as part of a circus and menagerie, and the paraphernalia and tents for the same, and the first party is not a common carrier thereof and cannot be required to transport the same, and

Whereas, The second party is also the owner of or uses special cars expressly designed and adapted for the carriage of said circus, animals, paraphernalia, tents, etc., and certain railway passenger coaches for the transportation of the performers in said circus, and the agents and employes of the second party in and about the same, and

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Whereas, The second party desires to enter into an agreement with the first party for the use of its roadbed and tracks and the necessary engines, engineers and other employes of the first party, for the purpose of moving said cars, equipment and employes of the second party from point to point where performances are to be given on the line of the railroad of the party of the first part.

Now, therefore, the parties hereto have covenanted and agreed, and do hereby covenant and agree, each with the other, as follows:

The first party agrees to furnish to and for the use of the second party the necessary locomotive engines, with the necessary fuel thereof, and the engineers, firemen and other employes, and the right to use its tracks for the transportation of said circus, menagerie, employes and equipment of the second party, by train of — sections, to consist of 15 coaches, 5 box cars, 21 stock cars and 40 flat cars being a total of 81 cars, from Watertown S. D. to Davenport, Ia., with the privilege of stopping for exhibition at the following places on the line of said railroad between said points, to-wit:

To be received empty from the M. & S. St. L. Road and moved: Watertown, S. D., to Sioux Falls, S. D., about midnight 8-2-13 and be delivered empty (or loaded) to the I. C. R. R. at Sioux Falls. Thence to be received empty from the C. B. & Q. and moved: Lincoln Nebr. to Atlantic, Ia., about midnight 8-11-13; Atlantic, Ia., to Des Moines, Ia., about midnight 8-12-13.

Des Moines, Ia., to Ottumwa, Ia., about midnight 8-13-13 and be delivered empty to the C. B. & Q. R. R.

Thence, to be received empty from I. C. R. R. at Cedar Falls, Ia., and switched to Waterloo, Ia., for loading and movement to Cedar Rapids, Ia., about midnight, August 21, 1913. Thence moved:

Cedar Rapids, Ia., to Iowa City, Ia., about midnight 8-22-13
Iowa City, Ia., to Davenport, Ia. " " 8-23-13

and be delivered empty to the C. N. & St. P. Ry. with the privilege of stopping for exhibition at the following places on the line of said railroad between said points, to-wit: and to haul 3 advance advertising cars, as hereinafter stated.

All movements are to be made during the month- of July & August 1913. No change shall be made in the foregoing or in the movement of cars unless ten days' notice in writing shall have been given to the first party and the first party has agreed to make such change, but in no event shall changes be made involving longer or more expensive hauls, unless for such additional compensation beyond that provided for herein as by the first party shall be deemed to be reasonable.

The second party warrants all of the said cars and coaches to be furnished by it as aforesaid, to be in good condition and
28 running order, and hereby agrees, at his or its own cost and expense, to keep same in like good condition and running order, and to this end furnish the men necessary to regularly and properly inspect said cars and coaches, to provide for proper oiling and to make all needful repairs thereof, and to indemnify and save harmless the first party against loss or damage resulting from any

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defects in said cars or coaches, or from overloading cars, or from the negligence of the second party or any of his or its employes, including those hired to it for the time by the first party, and to return all locomotives and other machinery in the condition received.

The first party may, however, for its own protection, if it so desires, itself inspect the cars and coaches used by the second party, and may cancel this agreement, if it deems such cars or coaches unsafe for use; but no act of the first party in inspecting said cars or coaches shall be understood or deemed to release the second party from any liability for loss, damage or injury that may occur by reason of the defective condition thereof, or from the use thereof in any manner.

It is further agreed that the first party shall not pay mileage for the use of said cars and coaches to be used in the transportation of the second party's circus, menagerie, paraphernalia, etc., and it is further agreed that if the said circus, menagerie, paraphernalia, etc., are delivered to the first party in cars for which it would be liable for mileage under usual customs, the second party agrees to pay, in addition to the amounts shown below herein, such mileage as the first party may be or become liable for to the owners thereof.

The first party agrees, at each of the above points, to furnish a sufficient number of engines and employes in connection therewith to enable the second party to do all necessary switching of its cars and train. The second party agrees to diligently and sufficiently inspect all of said cars and coaches, and to this end will employ a sufficient number of competent inspectors, but such inspectors may be chosen, if the second party shall so elect from the regular force of inspectors employed by the first party, and in that case no additional compensation shall be paid for this service to the first party.

The second party agrees, for the use of the railroad and engines of the first party, and the necessary engineers, firemen, train despatchers and other employes, to move and work said train, and in further consideration of the first party's agreements herein set forth, to pay to the first party the sum of Thirty one hundred forty five Dollars ($3,145.00) to be divided and paid in advance as per amounts shown herein.

From Watertown, S. D., to Sioux Falls, S. D.....	$.....
From Lincoln, Nebr., to Atlantic, Ia.....	$.....
From Atlantic, Ia., to Des Moines, Ia.....	$.....
From Des Moines, Ia., to Ottumwa, Ia.....	$3,145.00
From Waterloo, Ia., to Cedar Rapids, Ia.....	$.....
From Cedar Rapids, Ia., to Iowa City, Ia.....	$.....
From Iowa City, Ia., to Davenport, Ia.....	$.....

The said sum for each run to be paid before leaving each point of departure.

29 The second party further agrees, that, on or before the first movement of its circus, caravan or menagerie under this agreement, it will purchase and pay therefor, at the regular pub-

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lished tariff rates Nine hundred twenty ($920.00) Dollars' worth of transportation over the lines of the first party, for the exclusive use of the officers, agents, employes and servants of the second party, while traveling upon the regular trains of the first party in connection with the movement of said second party's circus, caravan or menagerie hereunder or in connection with advertising the same.

The second party agrees, by means of the service, and at the sole expense of the second party, to receive its cars and coaches from connecting carriers at Watertown, S. D., and to deliver the same to connecting carriers upon the termination of this agreement at Davenport, Ia., to load and unload all of said cars and coaches and train and to have the same loaded and ready to start from each of the above designated points, at such hour as will make it unnecessary to run faster than ordinary safety will admit.

It is expressly agreed and understood that this agreement is not made by the first party as a common carrier, but only as a hiring of said locomotives, engines and employes, and the use of its railroad to the second party, for the purpose of enabling the second party to move said train between said points; that all of the said cars, coaches and trains shall be operated under the management, directions, orders and control of the second party or its agents.

It is expressly understood and agreed that all engineers, firemen, conductors, brakemen, train despatchers and other operators and employes, furnished by the first party, are, in the operation and movement of said cars, coaches and trains, exclusively the employes of the second party, but all of said cars, coaches and trains shall be run according to the rules, regulations and time cards of the first party.

It is expressly understood and agreed, in consideration of the first party hiring the use of its railway and furnishing the motive power and employes to handle the second party's cars, coaches, paraphernalia and employes, as aforesaid, and for less than it would receive if it handled said circus, cars, paraphernalia, menagerie and employes, as regular freight and passengers upon its cars, and in consideration of the privilege of stopping over at the points hereinbefore designated, that the first party shall not be responsible or liable to the second party, or to any other person, partnership or corporation, for any delay of any cars or trains, however caused, and whether or not arising in any way from anyone's fault or negligence, or for any loss, damage or injury to the property or person of the second party or of anyone employed by the second party, or being upon any trains or cars, hauled under this agreement, or being upon any premises of the first party or connected in any way with said circus, caravan or menagerie, or with the business of the second party, or for any loss of or damage or injury to the property or person of anyone else, or of any partnership or corporation whatsoever, whether or not any such loss, damage or injury arises in any way from, or is in any degree attributable to, any fault or negligence of the first party or any of its officers, agents, or employes, in on about the performance of this agreement, or the performance of the first party's general business or in connection

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with the railroad or property or any duty whatsoever of the first party.

The second party further agrees that it will fully comply with any and all statutes and laws, either of the United States or of any State in which its cars and coaches may be located at any time, regulating the construction or equipment, or otherwise, of cars and coaches, and agrees to indemnify and save harmless the first party from any and all loss, damage, injury, fine or penalty or
31 claim therefor, which may occur to or be imposed against the first party, in any manner, arising or growing out of any violation or violations of any such statute or law, and from all costs and expenses whatsoever incident to or connected therewith.

But, if notwithstanding this contractual exemption from liability, the first party shall be held liable in any court for any loss, damage or injury, suffered by the second party on any account, it is hereby agreed, in consideration of the special undertaking of the second party and the low rate of charge, that such damage shall be and is hereby liquidated and stipulated not to exceed the actual value of the animals or property aforesaid, which for the purpose of this agreement, and by reason of the said special undertaking and low rate, it is by the second party stipulated agreed and represented that in no case will exceed the sum per head for each animal as follows:

Elephants, Hippopotami, Giraffes, Rhinoceroses.....	$500.00 each
Horses, Zebras, Lions and Tigers.....	100.00 each
All others for the equine and feline species.....	25.00 each
Buffaloes and others of the bovine species.....	50.00 each
Seals	10.00 each
Monkeys, Crocodiles, Alligators, Serpents and other Reptiles	5.00 each
Birds, all species, and all other animals not enumerated	5.00 each

It is further agreed that the value of each chariot, band wagon, calliope or other vehicle, will not exceed $100.00 and that the value of each canvas tent with center poles, ropes and paraphernalia complete, will not exceed $100.00.

The second party further agrees and undertakes, as a further consideration hereof, that in case of delay, loss, damage, or injury, to the person or property, either of the second party or any other persons, association of persons or corporation, carried or to be carried upon any of the cars or trains herein specified or employed
32 on or about or in connection with the same on the business of the second party, it, the said second party will release and does hereby release the first party from all liability or claim therefor for loss, damage or injury to itself or its business or property, will indemnify and forever save harmless the first party from all claim, demand, actions, causes of action, costs, judgments and expenses, including attorney's fees, resulting from or growing out of such delays, loss, damage or personal injury, the second party hereby assuming and agreeing to defend at its own cost all such claims, demands and actions, and to satisfy and pay the same, and the

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second party further undertakes and agrees to inform by personal notice, to each thereof, all of the persons permitted by the second party to be carried on any of said cars, coaches and trains, under the terms of this agreement, and to advise and notify all such persons, and each thereof; that they are carried by the second party and not by the first party, and that the first party has not assumed, with respect to them or their baggage or other personal property, any of the duties and responsibilities of a carrier of passengers.

It is further agreed that the second party may, at its option, furnish 3 advertising cars, carrying 25, 25 & 22 persons, respectively employed as advance advertising agents, traveling exclusively in said cars. Advertising or other agents, traveling upon ordinary and regular trains of party of first part, shall be provided with proper and regular transportations as above provided. Said cars to be in good order and running condition, and to be equipped with Master Car Builders' Association trucks, running gears, platforms, couplers, etc., and with air brake equipment, and these advertising cars may be attached to trains of the first party, to be designated by it, and hauled from Watertown, S. D., to Davenport, Ia., with the privilege of stopping and being left on the side track at any inter-
33 mediate station which the second party may designate, at any time between the tenth day of July, 1913, and the twenty-third day of August, 1913, and shall be moved upon notice from the second party, as soon after notice is given as practicable, for the consideration aforesaid, and the first party shall not be liable for any damage to or loss of said cars or property therein or for injury to or death of the persons carried thereon, whether or not arising from any fault or negligence of the first party, or any of its officers, agents or employes, and the second party agrees to indemnify and save harmless the first party against any loss or damage on account of injuries to or death of persons traveling in said advertising cars, or damages on account of loss or injury to their property, and this stipulation is to be deemed and construed as dependent upon and forming part of the foregoing agreement.

It is a further consideration of this agreement, and the parties hereto agree, that the second party is to have sole charge of every person and of all animals and property on any car, coach or train hauled under this agreement, and the first party does not assume, and shall be under no responsibility for the safety of any of the cars, coaches, persons, animals or property on said cars, coaches and trains, in charge of the second party, or of advance agents, from any cause whatever, and the second party agrees to, and does hereby indemnify and save harmless the first party against all loss damage or injury on account of strangers, tramps, or others riding on said cars, coaches or trains, and being injured or killed or on account of strangers, tramps or other persons being injured or killed in the operation of said cars, coaches, or trains, or in the handling, loading or unloading of cars, and will protect the first party from damages, and cost incident thereto, suffered by anyone from wild, tamed or domesticated animals escaping from cars or custody, and protect the

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first party against all loss damage and cost for and on account
34 of the spread or transmission of any disease to persons or animals from unloading offal or otherwise, and against any fine or penalty arising therefrom which may be imposed against the first party by any State, municipality or other competent authority.

The second party covenants and agrees in consideration of the foregoing, for itself or himself, and for all of the employes or other parties or persons employed or being in or around or in connection with said circus, menagerie or the business of the second party, that in the event of any loss, damage or injury of property or persons for which, in accordance with the terms, stipulations and provisions of this agreement, a cause of action may exist against the first party (it not being intended hereby in any manner to effect or restrict any such terms, stipulations or provisions), the second party, for himself and for his employes and such others, will give written notice of such loss, damage or injury to some freight or station agent of the first party within thirty (30) days after the occurrence thereof, and in such notice will state the time, place, nature, cause and amount of such loss, damage or injury. Failure on the part of the second party to comply with the requirements of this paragraph shall absolutely bar and defeat any cause of action for any such loss, damage or injury; and if such notice is given, any action for such loss, damage or injury must be brought within ninety (90) days after the occurrence thereof, and not later, any statutes of limitations to the contrary notwithstanding.

The party of the second part further covenants and agrees, that if any property of the first party or property of others in its possession and control is destroyed, damaged or injured while any trains or cars of the second party are upon the railroad of the first party, under this agreement, and such destruction, damage or in-
35 jury is done or contributed to by any employe of the second party or by any person connected with said circus or menagerie, or the business of the second party, then in that event the second party will reimburse the first party for such injury, damage or destruction, and for all loss, costs, expenses, and recoveries on account thereof, whether or not the acts of the second party's employes, or of the persons connected with said circus, menagerie or business, which caused or contributed thereto, were done in the course of their employment in or about said circus, menagerie or business.

In witness whereof, this agreement has been executed by the parties hereto on the day and year first above written.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

(Signed.) By H. GOWER, *Freight Traffic Manager.*

BARNUM & BAILEY SHOWS,

(Signed.) By CHAS. C. WILSON.

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Employment Contract No. 1.

This agreement made at Detroit this 9 day of June, 1913, by and between Albert Ringling, Alf. T. Ringling, Chas. Ringling, John Ringling and Henry Ringling, co-partners, doing business under firm name of Barnum & Bailey, herein known as party of first part, and Joe Mauchard of Detroit, Mich., party of second part.

Witnesseth: Expressly upon the considerations and conditions hereinafter named, the undersigned second party accepts employment of first party as C. H. and agrees to work for first party during season of 1913 at 20 — per month. Expressly on condition that second party continuously remain in the service of first party from date of this engagement to the end of present season, the first party, to encourage faithfulness among employes and efficiency in service volunteers as a gratuity to pay to second party an additional
36 $— for the last full month's service ending with the close of said circus season; but no rights whatever of second party shall vest regarding said payment, it being merely a gratuity and not affecting the salary hereinabove provided; and nothing in this clause contained shall qualify or limit the right to terminate this contract as hereinafter provided.

As evidence of good faith it is agreed that first party may retain one week's wages of second party until close of season.

It is known and understood by each party and recognized as a valuable consideration of the contract:

(*a*) That the times, manner and means of transportation incident to this employment in the circus business increase the risk in travel beyond the ordinary;

(*b*) That the character of the services to be performed involves hazard;

(*c*) That said first party contracts with railway lines over whose tracks they travel, to save said transporting companies harmless, even for gross negligence, from any and all claims, demands and damages of employees of first party, and especially second party herein;

(*d*) That such contract between Railway Company as private carrier and first party, furnishes the opportunity for employment of second party.

Now therefore, for valuable consideration, and in consideration of this employment and the furnishing by first party to second party of transportation and board of the kind customary and usual in the circus business, and in consideration of special personal benefits and advantages beyond the scope of employment inuring to second party herein, the second party accepts and assumes the increased hazard of railroad travel and circus service in all particulars and circumstances and hereby exempts and releases first party from all
37 claims for injuries, accidents, sickness and damages of whatever nature sustained in said service, whether due to negligence (including gross negligence) of first party, their employes, agents or bosses, or the negligence of any employee or agent of any

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railroad company transporting first party, when said second party is traveling on or using transportation furnished by any railway company under contract with first party; and second party, recognizing said privity in railroad transportation, hereby renounces his rights as "passenger" in traveling on any railroad line while in said service, and releases all such railroad companies from claim on his part for any damage or injury whatsoever; and second party agrees to protect, indemnify and hold harmless first party and to pay to first party (and when notified to personally assume payment of) all sums which first party may be subject to pay in consequence of any claim by, or injury, sickness or death to, second party; and second party hereby releases first party from any claim he may in the future have due to or growing out of any injury received in said service either as against first party or any railroad company, hereby binding himself, his heirs, executors and assigns firmly by these presents.

Second party agrees to faithfully, and to the entire satisfaction of the first party, perform his services under this contract, remain sober and refrain from the use of profanity or improper language, obey orders of superiors and bosses under whom he serves, abide by all reasonable rules and regulations of first party governing conduct of second party; and it is agreed that if at any time during the life of this contract the services of second party be or become unsatisfactory or his conduct offensive to first party, first party has the unrestricted right, free from claim or damage, to dismiss the second party from service and terminate this contract; and said terms and provisions are hereby recognized and accepted as a condition of employment under this contract.

38 It is agreed that if at any time during said season second party accepts service with said circus in a line of employment differing from the present in the character of services to be performed or risk incident, then that all the covenants herein contained (except as to salary where changed) shall obtain and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals the day and year first above written.

BARNUM & BAILEY,
By O. STEVENS.
JOS. MAUCHARD.

#525 W. 2nd St., Cincinnati, O.

I hereby certify that I am over twenty-one years of age; that I understand and am familiar with the character of services to be performed; that I voluntarily enter into this contract; that in this contract, which is solicited by me, I recognize personal special benefits beyond the scope of employment because of extensive travel and incident advantages; that I have carefully read—heard read—the fol-owing contract before signing and fully understand the same.

JOS. MAUCHARD.

Nearest Relative:
MRS. WALTER HERBE,
123 *Sumpter St., Brooklyn, N. Y.*

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Endorsed: Doc. 127. No. 13. District Court Douglas County, Nebraska. Joseph Maucher, Pl'ff, v. Chicago, Rock Island & Pacific Railway Co., Def't. Answer. Clerk's Fees $2.50. Paid by William D. McHugh, Att'y for Def't. Filed in District Court Douglas County, Nebraska Oct. 30, 1913. Robert Smith, Clerk.

39 Afterward, on the 8th day of January, 1914, a Reply was filed herein, which said Reply is in the words and figures following, to-wit:

Reply.

In the District Court of Douglas County, Nebraska.

127—13.

JOSEPH MAUCHER, Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Reply.

1. Comes now the plaintiff above name- and for reply to the answer of defendant filed herein, denies each and every allegation in said answer contained save and except what is hereinafter specifically admitted.

2. This plaintiff admits that at the time of entering into the employment of the Barnum & Bailey circus, he signed a contract of employment, but did not receive a duplicate or copy thereof and was not aware that he was signing or entering into any agreement to relieve from liability any railroad company over whose lines he might have occasion to travel in the course of his employment.

3. This plaintiff further alleges that the said alleged contract and agreement pleaded by the defendant, in so far as it undertakes to relieve the defendant from liability from the injury inflicted upon this plaintiff, is against public policy and void.

MAHONEY & KENNEDY,
Att'ys for Plaintiff.

40 STATE OF NEBRASKA,
County of Douglas, ss:

Joseph Maucher, being first duly sworn on oath deposes and says that he is the plaintiff in the above entitled cause; that he has read the above and foregoing Reply and that he believes the facts therein stated are true.

JOSEPH MAUCHER.

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Subscribed in my presence and sworn to before me this 7th day of January, 1914.

[SEAL.] PHILIP E. HORAN,
Notary Public.

Endorsed: Doc. 127. No. 13. In the District Court of Douglas County, Nebraska. Joseph Maucher, vs. Chicago, Rock Island and Pacific Railway Company, a corporation, Reply. Clerk's Fees 50¢ Paid by Mahoney & Kennedy. Filed in District Court Douglas County Nebraska Jan. 8, 1914 Robert Smith, Clerk. Refiled in District Court Douglas County, Nebraska Feb. 24 1914 Robert Smith, Clerk.

Afterward, at the September term of said Court, and on the 31st day of January, 1914, an Order was entered herein, as appears on Page 660 Journal 129, as follows, to-wit:

Order.

127—13.

JOSEPH MAUCHER, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Order.

Now on this day, on application therefor, defendant is hereby granted leave to amend its answer instanter by inserting therein matters to be known as paragraphs 9 and 10.

41 Afterward, on the 16th day of February, 1914, a Stipulation was filed herein, which said Stipulation is in the words and figures following, to-wit:

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Stipulation.

In the District Court of Douglas County, Nebraska.

Doc. 127, No. 12.

JAMES CROGHAN, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Doc. 127, No. 13.

JOSEPH MAUCHER, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

It is hereby stipulated and agreed by and between the parties hereto, that the following stipulation shall be read and received in evidence on the trial of each of the above mentioned cases.

Stipulation.

It is hereby stipulated and agreed, by and between the plaintiff and defendant in and for the purposes of this case:

1. That the allegations all and singular contained in paragraph 5 of defendant's answer, are true.

2. That is, at the trial of this cause, defendant shall produce a paper purporting to be the original of the alleged contract referred to as Exhibit "A" of defendant's answer, and purporting to bear the original signatures of the parties to said alleged contract, it shall be taken and accepted as a part of the evidence in this case, that the said signatures are genuine, and that the said instrument was executed by the proper representatives of the parties undertaking to enter into said contract, and that said instrument was at the
42 date thereof, and at the place therein named, duly executed and delivered as between said parties and said paper so produced shall be receivable in evidence in this action, as fully and with like effect as if the execution and delivery thereof, were proved by competent witnesses at the trial.

3. That if, at the trial of this case, the defendant shall produce a paper purporting to be the original of the paper referred to in paragraph 8 of defendant's answer as Exhibit "B" it shall be taken and considered as proved and established that said paper was signed by the parties, assuming to contract thereby and delivered as between them at the time and place indicated in said paper; and said paper so produced, shall be receivable in evidence as fully and with like effect, as if identified and its execution and delivery proved by competent witnesses at the trial. It shall also be considered as proved, that the plaintiff in this action and the person whose name

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purports to be attached to said instrument as the employee therein designated, is one and the same person, also that the said paper was executed by the proper representative of the party whose name purports to be attached to said instrument as the employer.

4. That the said Ringlings exhibited their said shows and menagerie at Lincoln, Nebraska, on August 11th, 1913, and in the night-time of said day, loaded their said circus, menagerie and property and performers and employees, including the plaintiff on and into a train of coaches and cars belonging to them for the purpose of the continuous transportation of the same, in said coaches and cars, on and over the tracks of this defendant, from Lincoln, Nebraska, to Atlantic, Iowa; that the defendant furnished at Lincoln, Nebraska, the necessary locomotive engine and fuel therefor, and engineer, fireman, brakeman, flagman, and conductor, to so transport and move said train of coaches and cars, and the
43 circus, menagerie, property, performers and employees therein and thereon from Lincoln, Nebraska, to Atlantic, Iowa, as aforesaid; that the defendant furnished said engine, fuel and employees under the contract attached to its answer herein as Exhibit "A" thereof, and said engine and employees did transport, move and operate said train of coaches and cars from Lincoln, Nebraska, and was transporting, moving and operating same, at the time of the collision set forth and mentioned in plaintiff's petition; that plaintiff, at the time he received the injuries complained of in his petition, was riding in and upon said train, and in one of the coaches belonging to said Ringlings, as the employee of said Ringling, for the purpose of being carried thereon, from Lincoln Nebraska, to Atlantic, Iowa, as such employee, without having paid tendered, agreeing to pay, or intending to pay any compensation to the defendant for his carriage as aforesaid; that the defendant did not receive and was not to receive, for the transportation of said train of coaches and cars, and the circus, menagerie, property, performers and employees, including plaintiff, on and over its tracks from Lincoln, Nebraska to Atlantic, Iowa, as aforesaid, any compensation other than the compensation stipulated in said contract, Exhibit "A" to be paid to the defendant by said Ringlings; that at the time plaintiff was injured, he was not riding in and on a train transporting or including any advertising car.

5. That the Interstate Commerce Commission of the United States issued its conference rule number sixty-three, Tariff Circular 13A, at the time and in the form as alleged in paragraph nine of defendant's answer. That the defendant filed with said Interstate Commerce Commission its rate notice No. B1636 at the time and in the form alleged in paragraph nine of defendant's answer. That the contract referred to in said rate notice number B1636 as contract number C136 was and is the same instrument of which exhibit "A" attached to said answer is a true and correct copy.

44 February 3rd, 1914.

MAHONEY & KENNEDY,
Att'ys for Plaintiff.
WILLIAM D. McHUGH,
Attorney for Deft.

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Endorsed: 127-12. District Court of Douglas County, Nebraska. James Croghan, Pl'ff, vs. Chicago Rock Island & Pacific Railway Company, Def't. Joseph Maucher, Pl'ff, vs. Chicago, Rock Island & Pacific Railway Company, Def't. Doc. 127, No. 12-13. Clerk's Fees, 50¢. Paid by W. D. McHugh, Att'y for Def't. Filed in District Court, Douglas County, Nebraska, Feb. 16, 1914. Robert Smith, Clerk.

Afterward, at the February term of said Court, and on the 24th day of February, 1914, an Order was entered herein, as appears on Page 579 Journal 137, as follows, to-wit:

Order.

127-13.

JOSEPH MAUCHER, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Order.

Now on this day this cause coming on for trial, the parties hereto being present by their respective counsel; thereupon came the following named persons as jurors, to-wit:

Edw. Razorshek,	Calvin T. Case,	F. J. Schollman,
Thomas Broomfield,	Con. D. Hanifan,	J. W. Light,
John Minikus,	Geo. Deal,	John C. Tully,
L. E. Drummond,	Gus Armbrust,	J. Nittler,

who were duly empaneled and sworn, and the trial proceeds.

And thereupon the said jury having heard the statements of counsel and the evidence adduced in part, the further hearing of this cause was continued until tomorrow morning at 9:30 o'clock.

45 Afterward, on the 25th day of February, 1914, Instructions by the Court were filed herein, which said Instructions are in the words and figures following, to-wit:

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Instructions by the Court.

In the District Court within and for Douglas County, Nebraska.

JOSEPH MAUCHER, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Court's Instructions to the Jury.

GENTLEMEN OF THE JURY:

1.

This is an action brought by Joseph Maucher, a resident and citizen of the State of New York, against the Chicago, Rock Island & Pacific Railway Company, to recover damages for injuries alleged to have been caused by and through the negligence of the defendant.

Plaintiff's petition in substance alleges that defendant is a railroad corporation owning and operating certain lines of railroad in the States of Nebraska, Iowa, and elsewhere, and conducting the general business of a railroad company including the transportation of passengers for hire. That on the 12th day of August, 1913, plaintiff was temporarily in the employment of the Barnum & Bailey Circus Company and as such was being transported as a passenger by the defendant from Lincoln, Nebraska, with destination at Atlantic, Iowa. The train upon which the plaintiff was being carried consisted in part of certain cars that were owned by said circus company, and in part of a certain engine owned by defendant, and said train was wholly in the charge of the defendant's servants, agents and employes composing the entire train crew, consisting of a conductor, engineer, fireman, brakeman and flagman and in the employ of the defendant and controlling the management and operation of said train.

46 That on said 12th day of August, 1913, at about one or two o'clock in the morning, while plaintiff was being carried by defendant as a passenger as aforesaid, and while said train on which plaintiff was such passenger was at or near the station of Richfield in Sarpy County, Nebraska, the said defendant by and through its servants, agents and employes, negligently caused a collision to occur between a certain other train of the defendant, operated by its servants, agents and employees, known as the Denver Express, and the train upon which the plaintiff was a passenger. That by reason of the collision of said trains the car in which plaintiff was being carried as a passenger by defendant, that same being one of the cars of said circus company was wrecked and thrown from the tracks and plaintiff was severely injured in his person in that he sustained severe internal injury to his abdominal organs, requiring a severe abdomonal surgical operation, and from which injuries he suffered

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great physical and mental pain and all of which resulted in a permanent weakening and impairment of his health and strength; that prior to said injuries plaintiff was a strong and robust man, thirty two years of age with a life expectancy of many years; being a cook by trade he was able to earn remunerative wages, but by reason of said injuries his earning cap-city has become greatly impaired, if not permanently destroyed and alleges that he has sustained damages to the amount of $50,000, for which he asks judgment.

Given.

A. C. TROUP, *Judge.*

To this petition defendant files an answer in which it admits that it was and is a railroad corporation owning and operating certain lines of railroad in the states of Nebraska, Iowa and elsewhere, and conducting the general business of a railroad company, including the transportation of passengers for hire; admits that at the time alleged in plaintiff's petition plaintiff was in the employ of a
47 circus company known as Barnum & Bailey Shows; admits that the train on which plaintiff was riding at the time alleged started from Lincoln, Nebraska, and was destined to Atlantic, Iowa; admits that plaintiff entered said train at Lincoln, Nebraska, to be transported therein to Atlantic, Iowa; admits that the train on which plaintiff was riding was made up in part of cars owned by said Barnum & Bailey Shows, and in part of an engine owned by this defendant; admits that collision occurred at or near Richfield, Sarpy County, Nebraska, between the said train upon which plaintiff was riding and a certain other train known as the Denver Express, owned and operated by this defendant.

Answering further defendant specifically denies that at the time of said collision and alleged injuries to the plaintiff, plaintiff was being transported by defendant as a passenger for hire or in any other capacity, and in that behalf alleges the fact to be that at said time plaintiff was being transported by said Barnum & Bailey Shows; it specifically denies that the train on which plaintiff was riding at the time of said collision and the occurrence of said alleged injuries, was in charge of the defendant or its agents, servants or employes, or was being operated, or was in control of defendant, or its agent, servants or employes; it alleges that it has no knowledge or information whereon to form a belief as to whether or not plaintiff was injured as alleged, or the nature and extent of the same, if at all, and therefore denies the same. It further denies each and every other allegation in said petition contained, not hereinbefore admitted to be true.

The defendant further alleges the existence of two certain contracts, one between itself and the circus company, whereby in consideration of the defendant transporting over its lines of railway, the persons and property of the circus company, according to specified times, places and conditions, the circus company, among other things, agreed to and did release the defendant from all liability for
48 the loss, damage or injury to itself, business and property as well as to loss, damage and personal injury to any person or persons employed by said circus company and required to be

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transported by defendant, and to save the defendant harmless therefor. The other, a contract between the plaintiff herein and said circus company by which, in consideration of his employment by the circus company, the plaintiff agreed to exonerate and hold harmless the said circus company and also all transportation companies, including the defendant, which may have occasion to transport the property and persons belonging to the circus company, including the plaintiff herein, from all loss, damage or injury to the person of plaintiff arising from any cause whatsoever.

It alleges that the transaction in question involved an interstate shipment and as applied to such the contracts in question are valid and binding agreements between the parties and that in pursuance to a rule of the Interstate Commerce Commission relating to the subject, the defendant duly filed its certain rate notice respecting the contract for transportation in question, with the Interstate Commerce Commission, which entitled the defendant to the benefits thereof.

Given.

A. C. TROUP, *Judge.*

The defendant therefore asks that plaintiff's petition be dismissed.

To this answer plaintiff files a reply in which he denies each and every allegation therein contained except that he admits that at the time of entering into the employment of the said circus company he did sign a certain contract, but alleges that in so far as the same undertakes to relieve the defendant from liability for injuries inflicted upon the plaintiff the said contract is void as against public policy.

Given.

A. C. TROUP, *Judge.*

49 2.

As before stated the gist of this action is negligence, and the burden of proof is upon the plaintiff to establish, by a preponderance of the evidence, that defendant was guilty of the same, as well as to so establish all the other material allegations of his petition, which are not admitted by the defendant's answer, herein, before he would be entitled to recover in this action. That is to say, it is for him to so establish:

That the plaintiff was injured at or about the time and place and substantially in the manner, alleged in said petition; that the injuries received were the result of the negligence of the defendant, its agents, servants or employes; that such negligence of the defendant was the proximate cause of said injury; that at the time of the occur-ence of said injuries, and immediately prior thereto, plaintiff himself was exercising ordinary care; but it is sufficient on the question of ordinary care on the part of the plaintiff, if the evidence offered in his behalf does not disclose that he was guilty of contributory negligence, that is, negligence on his part which directly contributed to the happening of the accident complained

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of; and, next, that plaintiff has sustained some damage by reason of said injuries, and the amount thereof.

Should you find that the plaintiff has established each and all of the foregoing propositions by a preponderance of the evidence, then plaintiff will be entitled to recover, subject, however, to the limitation as to the source of negligence prescribed in the next following instruction, to-wit, the instruction Number 3 herein.

If, however, you should find that plaintiff has failed to establish any one or more of the foregoing propositions by a preponderance of the evidence, or should you find that the evidence or any one or more thereof be evenly balanced, or that it preponderates in favor of the defendant, then in that case plaintiff will not be
50 entitled to recover and your verdict should be for the defendant.

Given.

A. C. TROUP, *Judge.*

3.

One of the defenses as outlined in its answer herein and relied upon by the defendant in this action, arises by virtue of two certain contracts introduced in evidence herein, one between the defendant and the circus company, by the terms of which the defendant agreed, among other things, to furnish to and for the use of the circus company the necessary locomotive engine, engineer, fireman, brakeman, conductor, train dispatcher and other employes, and the right to use its tracks for the transportation of the property and employes of said circus company from Lincoln, Nebraska, to Atlantic, Iowa, in consideration of which the circus company agreed, among other things, that the defendant should not be responsible or liable to the circus company or to any other person or persons for any damage or injury to the property or persons of the circus company, or to any one employed by the circus company, or being upon any train or cars hauled under said agreement, whether or not such damage and injury is in any degree attributable to any fault or negligence of the defendant, or any of its officers, agents or employes in or about the performance of said agreement as well as in or about the performance of the defendant company's general business in the operation of its road. This contract contained another provision whereby it was mutually agreed between the defendant and the circus company that the crew thus furnished the circus company for the operation, management and control of the circus train, should, while thus engaged, be regarded as exclusively the employes of said circus company, except that all said trains and cars should be run according to the rules, regulations and time cards of the defendant railway company.

51 The other contract referred to is one between the circus company and the plaintiff herein, wherein the plaintiff, in consideration of his employment by the circus company, agreed, in substance, among other things, to release all railroad companies over whose lines he may be transported as an employe of said circus company, which would include the defendant herein, from all claims

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on his part for any damage or injury whatsoever occurring to plaintiff while being thus transported.

In this behalf you are instructed that in so far as the first contract herein mentioned provided that the agents, servants and employes furnished by the defendant to the circus company and engaged in the operation and movement of said train and cars in the transportation of said circus company's property and employes at the time referred to, were to be regarded as exclusively the employes of the circus company, except the said cars and train should be run according to the rules, regulations and time card of said defendant, the same may be considered by you as valid and binding between the parties, in so far as this particular action is concerned, and you may therefore assume as a fact conclusively established that the employes aforesaid were, at all times referred to the servants and employes of the said circus company exclusively and not those of the defendant and that therefore their acts while so employed in the management, operation and control of said circus train, would be the acts of the circus company and not those of the defendant herein, and any negligence, if any there was on the part of the said agents or employes of said circus train will not be attributable to the defendant railway company.

Given.

A. C. TROUP, *Judge.*

52 4.

You are further instructed that in so far as said contracts aforesaid, or either of them, undertakes to exonerate and release the defendant herein from its acts of negligence in or about the performance of the defendant's general business in the operation of its road and trains, and to exempt and relieve defendant from any liability for personal injury to any employe of the circus company, and particularly to the plaintiff herein, resulting from the negligence of the defendant as the proximate cause thereof the same is void and of no effect.

Given.

A. C. TROUP, *Judge.*

5.

In ascertaining therefore whether or not the defendant was guilty of negligence, which was the proximate cause of plaintiff's injury, you will confine your inquiries in that regard to whether or not the defendant, by or through any of its agents, servants or employes engaged in, or in any way connected with the control, management, operation, or running of the defendant's train, designated in the pleadings herein as the Denver Express, but known in the evidence and at the trial of the case as "train Second Number 6". And is for the plaintiff to establish such negligence by a preponderance of the evidence before he will be entitled to recover.

Should the plaintiff so establish such negligence and likewise establish that such negligence was the proximate cause of plaintiff's

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injury, as well as also to so establish each and all of the other propositions required to be established according to instruction Number 2 herein, then plaintiff will be entitled to recover and your verdict should be for the plaintiff in such an amount as under instruction Number 11 herein you find he is entitled to receive.

53 If, however, you should find that plaintiff has failed to establish by preponderance of the evidence, that defendant was guilty of negligence in the control, management, operation, or running of its train known as "train Second Number 6", or that such negligence, if any, was the proximate cause of plaintiff's injuries, or has failed to so establish any one or more of the other propositions required to be established according to instruction number 2 herein, or should you find that the evidence upon any one or more of any of the propositions above stated or referred to be evenly balanced or that it preponderates in favor of the defendant, then plaintiff cannot recover and your verdict should be for the defendant.

Given.

A. C. TROUP, *Judge.*

6.

It is conclusively established by the evidence that at the time the passenger train known as "Second Number 6" left South Bend the defendant Railroad Company and the engineer and conductor of said Second Number 6 knew that the circus train was in what was called "the block", that is, was on the track somewhere between South Bend and Richfield, and it is also conclusively established that the engineer and conductor of Second Number 6 received at South Bend what was known in railroad service as block restriction card, which notified said engineer and conductor that the circus train was on the track between South Bend and Richfield. You are therefore instructed that it was then the duty of the defendant Railroad Company, and its servants, operating the train known as Second Number 6, to operate said train between South Bend and Richfield with due care and caution so as to avoid running into the rear of the circus train. It was then the duty of the defendant Railroad Company and its employes operating Second Number 6, to exercise such a degree of care in respect to the speed of Second Number 6, and the keeping of said Second Number 6 under

54 such control as men of ordinary care and prudence, under like circumstances, having due regard for the lives and safety of the persons known to be riding in and upon said circus train, would exercise under all of the circumstances, and if you find from the evidence that said train known as Second Number 6 was not operated with that degree of care which a person of ordinary care and prudence would have exercised under the circumstances then known to exist, for the safety of persons riding in the circus train, and that through the omission of that degree of care on the part of those who operated the train known as Second Number 6, said train ran into the rear of the circus train, and if you find that said negligence, or want of ordinary care, on the part of those operating

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train Second Number 6 was the proximate cause of the plaintiff's injury, then and in that event it will be your duty to return a verdict in favor of the plaintiff and against the defendant Railroad Company.

Given.

A. C. TROUP, *Judge.*

7.

You are instructed that you are the sole judges of the credibility of the witnesses and of the weight to be given to the testimony of each and all of them. In determining the weight which the testimony of the several witnesses is entitled to receive you must take into consideration their interest in the result of this suit; their relationship to the parties, if any such is shown, their apparent fairness, or bias, if any such appears; their conduct and demeanor while testifying; their opportunities for seeing or knowing the things about which they have testified; the reasonableness or unreasonableness of the statements made by them and all other evidence, facts and circumstances proven tending to corroborate or contradict said witness, if any such there be.

Given.

A. C. TROUP, *Judge.*

55 8.

By a preponderance of the evidence is meant not necessarily a greater number of witnesses testifying to any given fact or set of facts, but rather that amount of evidence which, on the whole, produces the stronger impression on the minds of the jury and convinces you of its truth when weighed against the evidence in opposition thereto.

Given.

A. C. TROUP, *Judge.*

9.

By negligence is meant the absence of such care, prudence and attention as under the circumstances duty requires should be given or exercised. It is the omission to do something which a reasonable man, guided by the considerations which ordinarily regulate the conduct of human affairs, would do in the circumstances shown; or it is the doing of something which a prudent and reasonable man would not do in the circumstances.

Given.

A. C. TROUP, *Judge.*

10.

The proximate cause is meant the primary or moving fault where no independent cause, disconnected therefrom, intervenes to produce the injury.

Given.

A. C. TROUP, *Judge*

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11.

Should you find under the evidence and these instructions that plaintiff is entitled to recover, it will be your duty to assess his damages at such a sum as will fairly compensate him for his injuries which the evidence shows he has sustained, as the direct and proximate result of the negligence of the defendant. In determining the amount to be thus awarded, you should take into consideration the nature and extent of such injuries, whether the same be temporary only, or permanent, and to what extent, if at all, said
56 injuries, or any thereof, may be permanent, the physical and mental pain, if any, plaintiff has endured and what he may be required to endure in the future, if any, to the extent, but to the extent only, as the evidence shows are reasonable certain to result from the injuries inflicted; plaintiff's earning capacity before the injuries occurred and the extent, if at all, which his earning capacity has been impaired or diminished by reason of said injuries, his present age and what would have been his probable expectancy of life had such injuries not occurred, and to aid you in this you may take into consideration the mortality tables which have been introduced in evidence herein; and upon a full and careful consideration of all the evidence in the case, and exercising your fair and honest judgment upon the facts in the case as established by the evidence and the law applicable thereto as given in these instructions, render your verdict for such sum, and such sum only, as will fairly and justly compensate plaintiff for the injuries sustained.

You are not permitted, however, to award what is known as vindictive or punitive damages, that is damages by way of punishing defendant for the alleged injuries inflicted. Such damages are not permissible in this state.

Should you find for the defendant your verdict will simply be a general one for the defendant.

Given.

A. C. TROUP, *Judge.*

12.

Upon retiring to the jury room to deliberate upon a verdict you will elect one of your number foreman whose duty it will be to sign your verdict when one is agreed upon. For your convenience two forms of verdicts will accompany these instructions.

If you agree upon a verdict when court is in session you will return the same forthwith into court. If you agree upon
57 a verdict however, when court is not in session, you will have the verdict so agreed upon signed by your foreman and place it, together with all other papers in the case in your hands, in an envelope, sealing the same and put it in the custody of your foreman, after which you will be at liberty to separate, all returning however at the next session of the court to deliver said verdict so agreed upon, into court.

Given.

A. C. TROUP, *Judge.*

By the Court.

A. C. TROUP, *Judge.*

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Endorsed: 127-13. In the District Court of Douglas County, Nebraska. Joseph Maucher, Plaintiff, vs. The Chicago, Rock Island and Pacific Railway Company, Defendant. Court s Instructions, to the Jury. Filed In District Court Douglas County, Nebraska, Feb. 25, 1914. Robert Smith, Clerk.

Afterward, on the 25th day of February, 1914, an Instruction requested by the Defendant and Refused was filed herein, which said Instruction is in the words and figures following, to-wit:

Instruction Requested by Defendant and Refused.

In the District Court of Douglas County, Nebraska.

Doc. 127, 13.

JOSEPH MAUCHER, Plaintiff,

vs.

C., R. I. AND P. RY. CO., Defendant.

Defendant's Request for Instruction.

The defendant requests the court to instruct the jury as follows:

1. You are instructed that if you find from the evidence that the operation performed on the plaintiff was unnecessarily performed, and in the exercise of ordinary and reasonable care, on the part of the surgeon performing the same, should not have been performed, and further find that plaintiff's condition is due
58 in whole or part to said operation and the result or effects induced thereby, then you are instructed, that in such case, the plaintiff is not entitled to recover in this action, any damage of and from the defendant for the pain and suffering caused by such operation, or any damage for so much of his present injuries and suffering as are due to and were caused by said operation.

Submitted by C. R. I. & P. Ry Co.

W. H. HERDMAN, *Att'y.*

Refused.

A. C. TROUP, *Judge.*

Endorsed: 127-13. Maucher v. C. R. I. & P. Ry. Co. Def't's request for Instruction to Jury. Filed In District Court Douglas County, Nebraska, Feb. 25, 1914. Robert Smith, Clerk.

Afterward, on the 25th day of Februarv, 1914, Defendant's Exceptions were filed herein, which said Exceptions are in the words and figures following, to-wit:

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Defendant's Exceptions.

In the District Court of Douglas County, Nebraska.

Doc. 127, No. 13.

JOSEPH MAUCHER, Pl'ff,

vs.

C., R. I. & P. RY. Co., Def'd't.

Def'ts Exceptions to Instructions to the Jury.

1. The defendant excepts to instruction No. 1 given by the court to the jury.
2. The defendant excepts to instruction No. 2 given by the court to the jury.
3. The defendant excepts to instruction No. 3 given by the court to the jury.
4. The defendant excepts to instruction No. 4 given by the court to the jury.
5. The defendant excepts to instruction No. 5 given by the court to the jury.

59 6. The defendant excepts to instruction No. 6 given by the court to the jury.

7. The defendant excepts to instruction No. 7 given by the court to the jury.
8. The defendant excepts to instruction No. 8 given by the court to the jury.
9. The defendant excepts to instruction No. 9 given by the court to the jury.
10. The defendant excepts to instruction No. 10 given by the court to the jury.
11. The defendant excepts to instruction No. 11 given by the court to the jury.
12. The defendant excepts to the refusal of the court to give to the jury Instruction No. 1 requested by the defendant.

C., R. I. & P. RY. CO.,

By W. H. HERDMAN, *Att'y.*

Exceptions allowed.

A. C. TROUP, *Judge.*

Endorsed: Doc. 127-13. District Court of Douglas Co., Nebr. Joseph Maucher, vs. C. R. I & P. Ry. Co. Def'd't's exceptions to Instructions to Jury. Filed in District Court Douglas County, Nebraska, Feb. 25, 1914. Robert Smith, Clerk.

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Afterward, at the February term of said Court, and on the 25th day of February, 1914, an Order was entered herein, as appears on Page 581 Journal 137, as follows, to-wit:

Order.

127-13.

JOSEPH MAUCHER, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Order.

60 Now on this day this cause again coming on for trial, the parties hereto being present by their respective counsel, also came the jury heretofore duly empaneled and sworn, and the trial proceeds.

And thereupon the evidence being concluded, defendant moves the court to direct a verdict in its favor, on consideration whereof, being fully advised in the premises, the Court overrules the said motion.

And the said jury having heard the instruction of the court and the arguments of counsel, retire for deliberation in charge of a sworn officer of this court.

Afterward, at the February term of said Court, and on the 26th day of February, 1914, a Verdict was rendered and a Judgment was entered herein, as appears on Page 582 Journal 137, as follows. to-wit:

Verdict and Judgment.

127-13.

JOSEPH MAUCHER, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Order and Judgment.

Now on this day again came the parties hereto by their respective counsel; thereupon came the jury heretofore duly empaneled and sworn, and in open court return the following verdict, to-wit:

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In the District Court of Douglas County, Nebraska.

Docket 127, No. 13.

JOSEPH MAUCHER, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Verdict of the Jury.

61 THE STATE OF NEBRASKA,
Douglas County:

We, the jury duly empanelled and sworn in the above entitled cause, to well and truly try the issues joined between the said parties, do find for the said plaintiff and do assess his damages at $12,500 Twelve thousand and five hundred dollars.

J. W. LIGHT, *Foreman.*

Whereupon the said jury was discharged from further consideration of this case.

It is therefore considered, ordered and adjudged by the court that the plaintiff have and recover of and from the defendant, the sum of Twelve Thousand Five Hundred ($12,500.00) Dollars, with interest and costs herein expended, taxed at $--.

Afterward, on the 28th day of February, 1914, a Motion for New Trial was filed herein, which said Motion is in the words and figures following, to-wit:

Motion for New Trial.

In the District Court of Douglas County, Nebraska.

Doc. 127. No. 13.

JOSEPH MAUCHER, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Motion for New Trial.

Comes now the defendant and moves the court to set aside the verdict of the jury rendered herein on February 26th, 1914, and to vacate and set aside the judgment entered on said day, and to grant defendant a new trial of said action, for the reasons:

1. That the court erred in overruling defendant's motion for an

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order instructing the jury to return a verdict in favor of the defendant.

62 2. The court erred in giving Instruction No. 1 to the Jury.
3. The court erred in giving Instruction No. 2 to the Jury.
4. The court erred in giving Instruction No. 3 to the Jury.
5. The court erred in giving Instruction No. 4 to the Jury.
6. The court erred in giving Instruction No. 5 to the Jury.
7. The court erred in giving Instruction No. 6 to the Jury.
8. The court erred in giving Instruction No. 7 to the Jury.
9. The court erred in giving Instruction No. 8 to the Jury.
10. The Court erred in giving Instruction No. 9 to the Jury.
11. The Court erred in giving Instruction No. 10 to the Jury.
12. The Court erred in refusing to give to the jury, Instruction No. 1 requested by the defendant.
13. The verdict is not sustained by the evidence.
14. The verdict is contrary to the evidence.
15. The verdict is contrary to law.
16. For errors at law occurring at the trial.
17. The verdict is excessive.
17½. Misconduct on the part of the jury.
18. The verdict is excessive and due to the passion and prejudice of the jury.

CHICAGO, ROCK ISLAND & PACIFIC RY CO.,
By W. D. McHUGH,
Attorney for Defendant.

63 [Endorsed:] Doc. 127. No. 13. District Court Douglas County, Nebraska. Joseph Maucher, Plff., v. Chicago, Rock Island & Pacific Railway Company, Deft. Motion for New Trial. Clerk's Fees $2.50 Paid by William D. McHugh, W. H. Herdman, Att'ys for Defendant. Filed in District Court Douglas County, Nebraska, Feb. 28, 1914. Robert Smith, Clerk.

Afterward, at the February term of said Court, and on the 17th day of March, 1914. an Order was entered herein, as appears on Page 602 Journal 137, as follows, to-wit:

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Order.

In the District Court of Douglas County, Nebraska.

127-13.

JOSEPH MAUCHER, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Order.

On motion of defendant made in open court, and for good cause appearing, it is ordered:

That the judgment heretofore entered on the 26th day of February, 1914, on the verdict herein, be and the same is hereby vacated and set aside, without prejudice, however, to the verdict so rendered.

Dated, Omaha, Nebraska, this 17th day of March, 1914.

By the Court.

A. C. TROUP, *Judge.*

Afterward, at the February term of said Court, and on the 18th day of April, 1914, an Order was entered herein, as appears on Page 641 Journal 137, as follows, to-wit:

64 *Order.*

127-13.

JOSEPH MAUCHER, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Order.

Now on this day this cause came on to be heard on the motion of the defendant to set aside the verdict of the jury returned herein on February 26th, 1914, and for a new trial of this action, and was submitted to the court.

On consideration whereof, the Court finds:

That the verdict so returned is excessive and that a new trial of this action should be granted, unless said verdict and the judgment entered or to be entered thereon, be reduced as hereinafter provided.

It is therefore ordered and adjudged that said motion be and the same is hereby sustained and a new trial be and hereby is granted, unless the plaintiff remit, within one day, from the verdict returned

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by the jury herein, and the judgment entered or to be entered thereon, the sum of Twenty five Hundred Dollars ($2,500.00), if said remittitur is filed by the plaintiff as last provided, the said motion for a new trial be and stands overruled.

The defendant excepts to each and every provision of the foregoing order, and is allowed forty days from the rising of the court to prepare and serve its bill of exceptions.

Dated Omaha, Nebraska, this 18th day of April, 1914.

By the Court.

A. C. TROUP, *Judge.*

Afterward, on the 18th day of April, 1914, a Remittitur was filed herein, which said Remittitur is in the words and figures following, to-wit:

65 *Remittitur.*

In the District Court of Douglas County, Nebraska.

JOSEPH MAUCHER, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Remittitur.

The Court having on this day made an order requiring plaintiff in the above entitled cause to remit the sum of $2,500 from the amount of the verdict returned herein by the jury, or in default of such remittitur to submit to a new trial, the plaintiff does hereby enter said remittitur in accordance with said order of the Court and hereby consents that the said judgment in favor of this plaintiff and against the defendant in said cause shall be in the sum of $10,000 instead of $12,500.

MAHONEY & KENNEDY,
Attorneys for Plaintiff.

[Endorsed:] Doc. 127. No. 13. In the District Court of Douglas County, Nebraska. Joseph Maucher vs. Chicago, Rock Island & Pacific Railway Company. Remittitur. Clerk's Fees 50c Paid by Mahoney & Kennedy. Filed in District Court Douglas County, Nebraska, Apr. 18, 1914. Robert Smith, Clerk.

Afterward, at the February term of said Court, and on the 18th day of April, 1914, an Order and Judgment were entered herein, as appear on Page 641 Journal 137, as follows, to-wit:

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Order and Judgment.

127-13.

JOSEPH MAUCHER, Plaintiff,
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Order and Judgment.

66 Now on this day this cause coming on further to be heard, and it appearing to the court that the plaintiff has filed herein a remittitur of $2,500 from the amount of the verdict returned by the Jury in this cause, said remittitur being in conformity to and compliance with the order of the Court made this day directing that unless such remittitur is made the motion for new trial will be sustained, the Court in consideration of said previous orders herein made and of the filing of said remittitur does hereby overrule the defendant's motion for a new trial, to which ruling the defendant excepts.

It is therefore considered and adjudged by the Court that the plaintiff have and recover of and from the defendant the sum of $10,000 together with interest thereon at the rate of seven per cent per annum from the 26th day of February, 1914, together with the costs of this action, taxed at $— and that execution issue therefor.

To which the said defendant excepts and said defendant is allowed forty days from the rising of the court at its present term within which to prepare and serve bill of exceptions herein.

By the Court.

A. C. TROUP, *Judge.*

Afterward, on the 21st day of April, 1914, a Bond was filed herein, which said Bond is in the words and figures following, to-wit:

Bond.

In the District Court of Douglas County, Nebraska.

Doc. 128. No. 13.

JOSEPH MAUCHER, Plaintiff,
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Undertaking and Bond.

67 Whereas, on the 18th day of April 1914, plaintiff in the above named case, obtained a judgment in said court in said

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case, against said defendant in the sum of $10,000 and costs taxed at $—. And

Whereas, the Chicago, Rock Island & Pacific Railway Company intends to appeal said case to the Supreme Court of the State of Nebraska.

Now therefore, we, Chicago, Rock Island & Pacific Railway Company as principal and American Surety Company of New York as surety, do hereby undertake to said Joseph Maucher in the sum of Twenty-one Thousand Dollars ($21,000) that said Chicago, Rock Island & Pacific Railway Company will prosecute such appeal without delay and pay the consideration and condemnation money and costs which may be found against it on the final determination of said cause in case said judgment shall be affirmed in whole or in part, by the Supreme Court of Nebraska.

Dated, Omaha, Nebraska, this — day of April, 1914.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
By WILLIAM D. McHUGH, *Its Attorney.*
[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK.
By PHILIP POTTER,
Resident Vice President.

Attest:
FREDERICK J. BURNETT,
Resident Assistant Secretary.

I hereby approve the foregoing bond and the surety thereon this 21st day of April 1914.

ROBERT SMITH,
Clerk District Court.
By ASEL STEERE, JR.,
Deputy.

68 [Endorsed:] Doc. 127. No. 13. District Court Douglas County, Nebraska. Joseph Maucher, Plff., v. Chicago, Rock Island & Pacific Ry. Co., Deft. Undertaking and Bond. Clerk's Fees $1.00 Paid by W. D. McHugh, Att'y for Deft. Filed in District Court Douglas County, Nebraska, Apr. 21, 1914. Robert Smith, Clerk.

THE STATE OF NEBRASKA,
County of Douglas, ss:

I, Robert Smith, Clerk of the District Court, in and for Douglas County, Nebraska, do hereby certify that the foregoing is a full and true Transcript of the proceedings and record had in the cause in the District Court containing the Petition, Notice of Removal, Petition for Removal, Order for Removal, Order Denying Removal, Answer, Reply, Order Granting Leave to Amend Answer, Stipulation, Trial Order, Instructions by the Court, Instruction Requested by Defendant and Refused, Defendant's Exceptions, Trial Order, Ver-

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dict and Judgment, Motion for New Trial, Order vacating Judgment, Order of Remittitur, Remittitur, Order overruling Motion for New Trial and Judgment and Bond in the case of Joseph Maucher against Chicago, Rock Island & Pacific Railway Company appearing of record in said Court.

I do further certify that the bill of exceptions hereto attached and made a part of this Transcript was attached by me and is the original bill of exceptions filed in the office of the Clerk of said Court, in the above entitled action.

In witness whereof, I have set my hand and affixed the seal of said Court at Omaha, this 2nd day of June, A. D. 1914.

[SEAL.] ROBERT SMITH, *Clerk*,
By CORNELIUS FARRELL, *Deputy*.

[Endorsed:] 18721 Maucher v. C. R. I. & P. R. Co. Transcript. Supreme Court of Nebraska. Filed Jul. 22, 1914. H. C. Lindsay, Clerk.

69 And on the same day there was filed in the office of the clerk of said supreme court a certain Bill of Exceptions, in the words and figures following, to-wit:

70 Received from William H. Herdman, Esq., for examination and amendment, a draft of a Bill of Exceptions in the case of Joseph Maucher, plaintiff, vs. Chicago, Rock Island & Pacific Railway Company, defendant, tried in the District Court of Douglas County, Nebraska, at the regular February, 1914 term, thereof.

May 4, 1914.

MAHONEY & KENNEDY,
Attorneys for Plaintiff.

I herewith return the Bill of Exceptions in the above entitled cause submitted to me on the 4th day of May, 1914, and propose no amendments thereto.

Dated this 5th day of May, 1914.

MAHONEY & KENNEDY,
Attorneys for Plaintiff.

Received the within Bill of Exceptions of Mahoney and Kennedy this 5 day of May, 1914.

W. H. HERDMAN,
Attorney for Defendant.

Endorsed: Filed, In District Court, Douglas County, Nebraska, May 9, 1914. Robert Smith, Clerk.

71 OMAHA, NEBRASKA, May 9, 1914.

I hereby certify that the within and following is a full, true and complete transcript of the proceedings had upon the trial of

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the case of Joseph Maucher, plaintiff, vs. Chicago, Rock Island, & Pacific Railway Company, defendant, and the same contains all the evidence, oral or documentary, offered or given by either party upon the trial of said case, and likewise contains all objections and motions relating to such evidence made by either party to said cause, the rulings of the court upon such objections and motions and the exceptions of the respective parties to such rulings.

I further certify that said trial was had at the time and place hereinafter set forth, and that upon application of the defendant, Chicago, Rock Island & Pacific Railway Company, this Bill of Exceptions is allowed by me, and ordered made a part of the record in said cause.

A. C. TROUP,
Judge of the District Court of the Fourth Judicial District of Nebraska.

STATE OF NEBRASKA,
Douglas County, ss:

I, Robert Smith, Clerk of the District Court, Fourth Judicial District of the State of Nebraska, in and for said County, do hereby certify that this is the original Bill of Exceptions filed in my office in the cause in said Court, wherein Joseph Maucher is Plaintiff and The Chicago, Rock Island and Pacific Railway Company — Defendant.

Witness my signature and official seal this 9th day of May, A. D. 1914.

72 [SEAL.] ROBERT SMITH, *Clerk*,
By ERNEST O. DREXEL, *Deputy*.

Endorsed: Filed in District Court, Douglas County, Nebraska, May 9, 1914. Robert Smith, Clerk.

OMAHA, NEBRASKA, May 1st, 1914.

I hereby certify that the following is a true and complete transcript of all the testimony, oral and documentary, offered or given by either of the parties hereto upon the trial of this cause, together with all the motions and objections made by either party to said cause, the rulings of the court on the same and the exceptions of the respective parties to such rulings as shown by my shorthand notes taken on the trial of the case.

C. C. VALENTINE,
Official Stenographic Reporter in and for the Fourth Judicial District of Nebraska.

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73 In the District Court within and for Douglas County, Nebraska.

Doc. 127. No. 13.

JOSEPH MAUCHER, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Bill of Exceptions.

Be It Remembered, that in the District Court within and for Douglas County, Nebraska, at the regular February, 1914, term thereof, to wit, on the 24th day of February, 1914, before the Hon. A. C. Troup, one of the judges of said court:

T. J. Mahoney, of Mahoney & Kennedy, appearing for the plaintiff, and William H. Herdman, Esq., appearing for the defendant, John W. Kelley, Esq., attorney for Ringling Brothers Co., a partnership, doing business as Barnum & Bailey and Barnum & Bailey Shows, sitting with the defendant; and a jury being impanelled and sworn to well and truly try the issues joined between the said parties the following proceedings were had, viz:

74 Mr. Mahoney: I will first offer the stipulation that has been signed in this case and some other cases by counsel on both sides to be known as Exhibit 1, which refers to other exhibits that I will offer later.

Exhibit 1 is as follows:

In the District Court of Douglas County, Nebraska.

Doc. 127. No. 15.

THOMAS CAMPBELL, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Doc. 127. No. 13.

JOHN MAUCHER, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Doc. 127. No. 14.

HARRY ARMESWORTHY, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Doc. 127. No. 12.

JAMES CROGHAN, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Stipulation.

It is hereby agreed in each of the above entitled cases, as follows, to-wit:

75 1. That Exhibit 1 "*a*" and Exhibit 1 "*b*" hereto attached are true copies of train order No. 67 issued by the defendant company on the evening of August 11th, 1913, and of a certain Clearance Card Form A and Block Restriction Card delivered to the Conductor and Engineer of Rock Island train known as 2nd No. 6.

2. That Exhibit 2 "*a*" and Exhibit 2 "*b*" hereto attached are true and exact copies of train order 71 issued by the defendant company on the evening of August 11th, 1913, and Clearance Card Form "*a*" and Block Restriction Card delivered to the conductor and engineer of train with engine 1750 at Lincoln, Nebraska, on said date.

3. That exhibit 3 hereto attached is a true copy of train order 73 issued by the defendant company on the evening of August 11th, 1913, to the conductor and engineer of Engine 1750 and delivered to said conductor and engineer at Lincoln, Nebraska, on the evening of said date.

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4. That exhibits 4*a* and 4*b* hereto attached are true copies of train order No. 74 issued on the night of August 11th, 1913, by the defendant company and addressed to the conductor and engineer of extra No. 1750 and the Rock Island Clearance Card Form "A" and the Block Restriction Card, both delivered to the conductor and engineer of extra 1750 at Havelock on the night of August 11th, 1913.

5. That exhibit 5 hereto attached is a true copy of Rock Island Line's Clearance Card Form "A" and Block Restriction Card delivered to the conductor and engineer of 2nd No. 6, a passenger train of the defendant company at about 12:18 A. M. of the morning of August 12th, 1913, at South Bend, Nebraska.

6. That Exhibit 6 hereto attached is a true copy of the defendant's train sheet as kept in its chief despatcher's office at Fairbury,
76 Nebraska, for the night of August 11th, and the morning of August 12th, 1913.

7. That at the trial of the above entitled cases and each of them, said several exhibits shall be receivable in evidence to the same extent and for like purposes as the originals thereof duly proved and authenticated would be. But, said exhibits shall not be receivable in evidence to any greater extent or for any other purpose than would be the originals thereof, the intention of this stipulation being to save the necessity of producing and identifying the originals of the said several documents.

8. That exhibit 7 hereto attached is the official time table of No. 21 of the defendant company in force on the 11th and 12th of August, 1913, and that such printed portions of said exhibit as assume to state certain rules of the defendant company correctly state said rules as in force upon that date.

9. That exhibit 8 hereto attached is the book of rules of the defendant company that was in force on the 11th and 12th of August, 1913.

MAHONEY & KENNEDY,
Attorneys for Plaintiffs.
W. D. McHUGH,
W. H. HERDMAN,
Attorneys for Defendant.

77 Mr. Mahoney: The plaintiff now offers and reads in evidence the deposition of certain witnesses taken in this case and filed herein on the 28th day of January, 1914, and upon the 16th day of February, 1914.

I will read the deposition of William Charles Cavanagh.

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In the District Court of Douglas County, Nebraska.

Doc. 127. No. 15.

THOMAS CAMPBELL, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Doc. 127. No. 13.

JOHN MAUCHER, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Doc. 127. No. 14.

HARRY ARMESWORTHY, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Doc. 127. No. 12.

JAMES CROGHAN, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Stipulation.

It is hereby stipulated by and between the parties to the above entitled actions, that the depositions of William Charles Cavanagh, J. A. Dickens, W. D. Oakford, R. N. Cook, and Charles E. Bitzer, on the part of the plaintiffs above named, may be taken at the office of Mr. W. H. Herdman, 413 First National Bank Building, Omaha, Nebraska, before P. H. Smalley, Notary Public, on the 16th
78 day of January, 1914, at 10 o'clock A. M., it is further stipulated and agreed by and between the parties that the depositions of W. W. Cameron, O. B. Olson. W. P. Kingsley, Frank S. Brooks, Bert Thornton and Joseph W. King, on behalf of the plaintiffs, be taken at the same place on the following day, January 17th, 1914, at 9:30 A. M., before the same authority.

It is further hereby stipulated and agreed by and between the parties hereto that the statutory notice required for the taking of said depositions is hereby waived; that the signatures of the witnesses is also hereby waived; and further, that the depositions so taken, may be offered and received in evidence in each of the above

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entitled cases, on behalf of the plaintiffs therein, subject to all objections interposed at the time of the taking of said depositions.

MAHONEY & KENNEDY,
Att'ys for Plaintiffs.
CHICAGO, ROCK ISLAND &
PACIFIC RY. CO.,
By W. D. McHUGH &
W. H. HERDMAN,
Its Attorneys.

79 Depositions of sundry witnesses taken before me, P. H. Smalley, Notary Public, within and for the County of Douglas, in the State of Nebraska, on the 16th day of January, in the year 1914, at the hour of 10 o'clock a. m., in said county, pursuant to the annexed stipulation, to be read in evidence in behalf of the plaintiff in four actions pending in the District Court of Douglas County, Nebraska, in which Thomas Campbell, John Maucher, Harry Armesworthy and James Croghan are each plaintiffs in four separate cases, and in which the Chicago, Rock Island & Pacific Railway Company — Defendant.

The plaintiffs were represented by Mr. Philip E. Horan, of the law firm of Mahoney & Kennedy, and the defendant was represented by Mr. W. H. Herdman.

WILLIAM CHARLES CAVANAGH, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Direct examination by Mr. Horan:

1 Q. You may state your name.
A. William Charles Cavanagh.
2 Q. Your residence.
A. Fairbury, Nebraska.
3 Q. Occupation?
A. Chief Train Dispatcher.
4 Q. Mr. Cavanagh, what are the duties incident to the office of Chief Train Dispatcher.
A. General supervision of the train and engine crews and the freight trains, equipment, and moving of same.
80 5 Q. Mr. Cavanagh, is it a part of your duties as chief train dispatcher to examine the conductors, engineers, brakemen and operators and dispatchers in your division?
A. It is, along with Mr. Oakford, and separately.
6 Q. Would you explain to me, Mr. Cavanagh, what is understood in railroad usage by the term 19 order.
A. 19 order is an order given to a train that does not restrict its rights, but assists it in the movement.
7 Q. Mr. Cavanagh, would you further explain what is understood in railroad usage by the term of a 31 order.
A. A train order which restricts the rights of a superior train.

D CLOSE IN CENTER

8 Q. Mr. Cavanagh, I am handing you a plaintiff's exhibit 5, would you explain the significance of that card when given to a train.

A. That is a general form regardless of this particular crew, a block restriction card. Notifies the first class train, second No. 6, that there is an extra east in the block ahead of them, and that they should proceed under control until they arrive at the next open block office.

Plaintiff's attorney reads in evidence, without objection, Exhibit 5.

(EXHIBIT 5.)

Rock Island Lines.

Clearance Card Form "A" and Block Restriction Card.

SO. BEND STATION, Aug. 12, 1913.

Conductor and Engineman No. 2nd No. 6.
Orders for your train are:
Form "19," None.
Form "31," None.
Pink Bulletin, None.
Train Order Signal is displayed for Caution Block.
Block Restrictions: Circus Train.
Extra 1750 in block.

R. N. COOK, *Operator.*

81 Form "31," Numbers O. K. at — — M.

—— ——, *Dispatcher.*

If no orders Form "19" or "31" or "Pink Bulletin" or "Block Restrictions", endorse "None" in space provided opposite each.

This does not affect any orders you may have received.

Conductors and Enginemen must each have a copy of this form and must see that their train is correctly designated and, when accompanied by "31" train orders, the Train Dispatcher's O. K. with the time noted thereon; and also see that the numbers of Train Orders and Pink Bulletins received correspond with those inserted above.

9 Q. Exhibit 5, then Mr. Cavanagh, is an order which restricts the movement of the train to which it is given?

A. Not exactly an order, it is what we call a block restriction card.

10 Q. Its effect is to restrict the movement of the train to which it is given?

A. Yes, sir.

11 Q. Are all employes of the railroad company working upon trains as conductors, engineers or brakemen instructed in the effect and purpose of this block restriction card?

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A. They have been instructed and also in addition to that, the book of rules plainly explain it.

12 Q. Mr. Cavanagh, when you stated that this card gave notice to the train crew to which it was handed, that there is a preceding train ahead in the block and that they are to proceed with caution, what did you mean by the word "caution" as used there?

A. Proceed so that they can stop within their vision.

82 13 Q. Is there any further understanding in regard to the block restriction card, that a train crew receiving such card is not to exceed the rate of speed of the preceding train in the same block?

A. That is the instructions of the book of rules, except in the vision whether they can see the main track to be clear, they can increase the speed.

14 Q. Mr. Cavanagh, for the purpose of explaining to those who would not understand it, you might define the word block, what is meant by the word "block"?

A. A block is a length of track between two stations where we have open block offices.

15 Q. In other words, Mr. Cavanagh, you mean by a block, that part of the track which intervenes between two stations at which operators are at work receiving and giving messages?

A. Yes, sir.

16 Q. Mr. Cavanagh, is it not customary on the Rock Island Road to allow all trains to enter a block in which another train is already moving in the same direction?

A. On passenger trains we do not allow two passenger trains to enter the block where there is no intermediate siding. The same applies on freight trains following passenger trains, or passenger trains following freight trains, except in cases of excessive time, and it is presumed something has happened. We then issue a 31 train order for a train to proceed with caution, notifying that the preceding train is evidently in trouble. In other words, it is not customary, but it is done in exceptional cases. It is not a regular custom, but it is an exception.

Q. Mr. Cavanagh, in cases in which there is an intermediate

83 siding, one or more intermediate sidings, what rule has the Rock Island with regard to permitting trains to enter the same block?

A. They are then permitted to follow within ten minutes, except in passenger trains, and they are permitted to meet at intermediate sidings by train order.

Mr. Horan: That is all.

Cross-examination by Mr. Herdman:

17 Q. Referring to the block on which the collision occurred on August 11th, 1913, in which plaintiffs allege they were injured, is that a block with an intermediate siding?

A. It is.

18 Q. So that the operation of trains within that block is within

UND CLOSE IN CENTER

the exception you speak of, as to allowing one train to follow another?

A. It is.

19 Q. And this exception you speak of is covered and provided for by the rules of the company?

A. It is.

Mr. Herdman: That is all.

(*J. A. Dickens—Direct Examination.*)

Mr. Mahoney reads, without objection, deposition of J. A. Dickens as follows:

J. A. DICKENS, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

84 Direct examination by Mr. Horan:

20 Q. You may state your name.

A. J. A. Dickens.

21 Q. Your residence?

A. Fairbury, Nebraska.

22 Q. Your occupation?

A. Train Dispatcher.

23 Q. For what railroad?

A. C., R. I. & P.

24 Q. Mr. Dickens, were you on duty as operator for the Chicago, Rock Island & Pacific on the evening of August 11th, 1913?

A. Not as operator, but as train dispatcher.

25 Q. As train dispatcher?

A. Yes, sir.

26 Q. What duties have you as train dispatcher, Mr. Dickens?

A. Well that is quite—I am supposed to handle all the trains on my hours, between the hours of 4 p. m. and midnight.

27 Q. By handling them, you mean giving orders?

A. Handling the movement, giving the orders of passing and meeting.

28 Q. And what hours were you on duty on the evening of August 11, 1913?

A. I was on duty from 4 p. m. until 11:50 p. m.

29 Q. Mr. Dickens, do you remember whether or not on the evening of August 11, 1913, you gave any orders to train No. 1750, I believe it was, the circus extra, engine 1750, the circus train?

A. Yes, sir.

30 Q. Do you remember what those orders were?

A. I think it was 74, I am not sure. 73 and 74 I guess.

31 Q. Mr. Dickens, I hand you here Plaintiff's exhibit No. 3, and ask you whether or not that is an order which you gave to engine 1750 on the evening of August 11, 1913?

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A. It is.

32 Q. I hand you also exhibit 4*a*, and exhibit 4*b*, and ask you whether or not those are also orders which were given to engine 1750 extra from Lincoln on the evening of August 11, 1913?

A. It is.

85 Plaintiff's attorney reads in evidence, without objection exhibit 3.

(EXHIBIT 3.)

Form C. T. 111. Standard.

Train Order 73.

FAIRBURY, Aug. 11, 1913.

To C. & E., Eng. 1750.
Form 31:
At Lincoln X. at 10:10 P. M.

J. J. M., *Operator.*

Eng. 1750 run Ex. Lincoln to Albright met No. ninety seven 97 Eng. 1781 at Murdock Ex. 1750 East hold main track at Murdock.

W. C. C.

Repeated at 10:10 P. M.

J. J. M., *Operator.*

Signed by:	Train:	Made.	Time:	Dispatcher:	Operator:
P. Spence x:	1750:	Complete:	10:10 P.M.:	J.A.D.:	McMillan:

Plaintiff's attorney offers and reads in evidence, without objection, exhibit 4*a* and exhibit 4*b* as follows:

(EXHIBIT 4*a*.)

Form C. T. 110.

Rock Island Lines.

Order No. 74.

FAIRBURY, 8/11, 1913.

To C. & E. Extra 1750 East:
At Havelock X/ at 10:35 P. M.

L. E. GRAY, *Operator.*

Form 19:

UND CLOSE IN CENTER

Order no 71 is annulled second 2n no six 6 eng 904 waits at Lincoln until eleven twenty 1120 P. M. Havelock until eleven twenty seven 11 27 p m prairie Home until eleven thirty six 11 36 p m alve until eleven forty five 11 45 p m Murdock until eleven fifty three 11 53 p m South Bend until eleven fifty nine 11 59 p m Meadow until twelve naught six 12 06 A. M. Richfield until twelve fifteen 12 15 a m W C C

Made Complete time 10 35 P. M.

By J. A. D.
L. E. GRAY, *Operator.*

86 (EXHIBIT 4*b*.)

Form C. T. 94A.

Rock Island Lines.

Clearance Card Form "A" and Block Restriction Card.

HAVELOCK STATION, Aug. 11, 1913.

Conductor and Engineman No. extra 1650 east:

Orders for your Train are:
Form "19," No. 74.
Form "31," None.
Pink Bulletin, None.
Train order signal is displayed for 19 order No. 74.
Block Restrictions: None.

L. E. GRAY, *Operator.*

Form "31" Numbers O. K. at — M.

—— ——, *Dispatcher.*

If no orders Form "19" or "31" or "Pink Bulletin" or "Block Restrictions" endorse "None" in space provided opposite each.

This does not affect any orders you may have received. Conductors and Enginemen must each have a copy of this form and must see that their train is correctly designated and, when accompanied by "31" train orders, the Train Dispatcher's O. K., with the time noted thereon; and also see that the numbers of Train Orders and Pink Bulletins received correspond with those inserted above.

32 Q. Mr. Dickens, do you remember whether or not on the evening of August 11, 1913 you gave any orders to Second 6.

A. Yes, sir.

33 Q. Do you remember what those orders were?

A. I can not recall them word for word. I gave second No. 6 a wait order stringing from Lincoln to Richfield. I have the book here, I can get it. It is between 71 and 74.

34 Q. I hand you herewith, Mr. Dickens, plaintiff's exhibit 2*a*,

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and plaintiff's exhibit 2*b*, and ask you whether or not those are true copies of the orders which were given to Second No. 6 on the evening of August 11, 1913.

A. They are.

Plaintiff's attorney offers and reads in evidence, without objection exhibits 2*a* and 2*b* as follows:

87 (EXHIBIT 2*a*.)

Form C. T. T. 111.

Train Order No. 71.

FAIRBURY, Aug. 11, 1913.

To C. & E. 2nd No. 6 & all trains East:
Form 31:
At Lincoln X. at 9:30 P. M.

J. J. M., *Operator.*

Second 2nd No. six 6 Eng 904 waits at Lincoln until eleven ten 11 10 p m Alvo until eleven forty 11.40 p m Murdock until Eleven forty eight 11 48 p m Rumsey until twelve fifteen 12 15 a m.

W. C. C.

Repeated at 9:30 P. M.

J. J. M., *Operator.*

Signed by	Train	Made	Time	Dispatcher	Operator
B Spence	x 1750	Complete	9:30 P. M.	J. A. D.	McMillan
Belfield	x 1721				

(EXHIBIT 2*b*.)

Rock Island Lines.

Clearance Card Form "A" and Block Restriction Card.

LINCOLN STATION, Aug. 11, 1913.

Conductor and Engineman No. Eng. 1750:
Orders for your train are:
Form "19," None.
Form "31," 71 - 73.
Pink Bulletin, None.
Train Order Signal is displayed for ——
Block Restrictions: None.

McMILLAN, *Operator.*

88 Form "31" Numbers O. K. at 10 11 M.

J. A. D., *Dispatcher.*

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If no orders Form "19" or "31" or "Pink Bulletin" or "Block Restrictions" endorse "None" in space provided opposite each. This does not affect any orders you may have received. Conductors and Enginemen must each have a copy of this form and must see that their train is correctly designated and, when accompanied by "31" train orders, the train dispatcher's O. K., with the time noted thereon; and also see that the numbers of Train Orders and Pink Bulletins received correspond with those inserted above.

35 Q. Mr. Dickens, I presume you are familiar with the rules governing the actions of train employees of the Rock Island when receiving their orders from the operators and dispatchers?

A. Rules as apply to train dispatchers, yes, sir.

36 Q. Are you not also familiar with the meaning which orders have for conductors and enginemen when given them on their trains?

A. Yes, sir.

37 Q. Mr. Dickens, what is the force and effect of a block restriction card when given to a train crew?

A. Well it is—a block restriction card given to a train notifies them that there is another train in the block, and that they are to run with caution and under control around all curves until that train has been passed.

38 Q. What do you mean, Mr. Dickens, by the word "caution," to run with caution?

89 A. Under control, able to stop in a limited distance.

39 Q. Does this limited distance vary?

A. Well, it is owing to the curves, as far as a man can see. It does not restrict his speed on straight track, but curves.

46 Q. Would it be correct to say, Mr. Dickens, that a block restriction card requires a train crew to be able to stop within the vision of said crew?

A. Yes, sir.

47 Q. Mr. Dickens, is it, or not, true that this block restriction card has the further effect of limiting the speed of the train admitted to a block with another, to the speed of the preceding train?

A. Except on straight tracks where they can see.

48 Q. Mr. Dickens, would you explain what is meant by o.s.ing a train out of a station?

A. That is reporting the time they pass there. We record that on the train sheet in ink, that is the way we have of keeping track of all of our trains.

49 Q. Are you familiar with the train sheet prepared on the evening—that is showing the time of the trains on the evening of August 11, 1913?

A. I do not just understand your question.

50 Q. Would you be able to state whether or not for instance, the times given on this particular train sheet, that I am going to offer you here, are the times of these trains on that evening?

A. Yes, sir.

51 Q. I hand you herewith plaintiff's exhibit No. 6, and ask

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you whether or not that is a correct copy of the defendant's train sheet for the trains running on the evening of August 11, and morning of August 12th.

A. It is. I made this myself and I know it is correct.

90 Mr. Mahoney: I offer in evidence train sheet Exhibit 6.

There being no objection exhibit 6 is read in evidence as follows:

Rock Island Lines.

Lines West of Missouri River.

Telegraph Movement of Trains.

Barnum & Bailey Circus.

Symbols	:	T	:
Train	:	2/6	: Exa
Conductor	:	Brooks	: P. G. Spence
Engine	:	904	: 1750
Engineer	:	C. L. Bitzer	: Bell
* * * *	:		
Richfield	:		:12:35
4.7			
Meadow	:	12:28	
5.4	:		59
South Bend	:	12.18	:11 53
* * * *			

2nd No. 6 went into rear of Ex. 1750 just west of west switch at Richfield order wrecker & send all medical aid possible.

91 Mr. Horan: That is all, Mr. Dickens.

Cross-examination by Mr. Herdman.

40 Q. Referring to plaintiff's exhibit 6, the train sheet, and calling your attention to the entries at the top thereof on the first four lines, please tell us just what the entries mean.

A. Where the entry is "Exa" means an extra train, where the entry is in figures it means a regular train. The entries in the second line indicate the conductor handling the *the* train. The entry in the third line is the number of the engine of the train, and the entry in the fourth line is the name of the engineer.

41 Q. Calling your attention to the entries appearing on the said train sheet opposite the name of the stations appearing on said train sheet, what do said entries indicate?

A. That is the time the certain trains pass those stations.

42 Q. Those entries indicate the time out?

A. In and out where there are two figures, indicates arrival and departure.

43 Q. Which indicates the time in?

A. The first figures.

D CLOSE IN CENTER

44 Q. Would that be in the bottom of the page?
A. If it is going east it means the bottom of the page.
45 Q. Where there is only one entry opposite the name of any station, it indicates the time through or out?
A. Yes, sir.
Mr. Herdman: That is all.

Redirect examination by Mr. Horan:

46 Q. Referring, Mr. Dickens, to the notation 1235 under
92 Extra A. P. G. Spence, Engine 1750, Bell Engineer, would you state whether or not this entry was made as a result of the o. s. ing of this train out of the station at Richfield?
A. I was not on duty at that time. I went off at 11:50.

Mr. Mahoney reads, without objection, deposition of W. D. Oakford.

W. D. OAKFORD, of lawful age, being by me first duly examined, cautioned and solemnly sworn as hereinafter certified, deposeth and sayeth as follows, viz:

Direct examination by Mr. Horan:

47 Q. You may state your name.
A. W. D. Oakford.
48 Q. Residence?
A. Fairbury, Nebraska.
49 Q. Occupation?
A. Road foreman of equipment.
50 Q. What are your principal duties in that position, Mr. Oakford?
A. I am in charge of the motive power and the man that operates it and all equipment, which is the cars and machinery.
51 Q. Are you familiar with the force and effect of the block restriction card in use on the Rock Island System?
A. Yes, sir.
52 Q. What is the force and effect of such a card when given to a train on the Rock Island System?
A. It is to caution the train, if there is a train preceding it through a block.
93 53 Q. What effect, if any, would such card have upon their rate of speed and upon their carefulness in approaching curves?
A. It would run under control where the track does not seem to be clear, and where the track does seem to be clear they can run at the usual speed.
54 Q. Mr. Oakford, do you mean then, that where a train crew sees some obstacle ahead on the track that they must run under control and not otherwise?
A. No it is not necessary to see the obstacle but where they can see the track clear.

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55 Q. Then your understanding of this card, Mr. Oakford, is that it is necessary for a train crew receiving this block restriction card to be able to stop, to have their train under such control as to be able to stop within their vision?

A. Yes, sir.

56 Q. And Mr. Oakford, does such block restriction card have the further effect of reducing the speed of the train receiving this card to that of the preceding train in the block?

A. Yes, sir; it is so stated in the book of rules.

57 Q. Are you familiar with the extra from Lincoln to Albright on the Rock Island Road on the evening of August 11, pulled by engine No. 1750?

A. Yes, in a way. I was at Lincoln when they departed.

58 Q. What would be the average rate of speed of such a train?

By Mr. Herdman: Objected to as incompetent, irrelevant and immaterial.

A. That would be pretty hard to answer.

94 By Mr. Horan: I will withdraw the question.

59 Q. I ask you, Mr. Oakford, whether or not the train which enters the block following a train already within, and receiving such caution card, has knowledge of the rate of speed at which the preceding train is traveling?

A. They do, in a way, I understand that a freight train does not travel as fast as a passenger, but they do not know exactly how fast that train is traveling at all points in that block.

60 Q. But they are acquainted with the schedule time of said train as set forth in its orders?

A. Yes, sir.

61 Q. And they furthermore know the rate of speed at which it has passed between preceding stations, do they not, from their reports?

A. They do not.

62 Q. They are not acquainted with the time the train left the station?

A. They are acquainted with the time but not the speed.

63 Q. They know the time that train entered and left the preceding block, do they not?

A. They are supposed to, I do not know whether they did or not.

64 Q. Regardless of this particular case?

A. Yes, that is the rule.

65 Q. Mr. Oakford, are you familiar with the distance in which a passenger train such as Second No. 6 on the evening of August 11, 1913, composed as it was, would be able to stop?

A. At what—give me the speed and grade, etc.

66 Q. A train composed as No. Second 6 was, going at the
95 *the* rate of 35 miles an hour, in what distance should it be able to stop?

A. About eight or nine hundred feet.

CLOSE IN CENTER

67 Q. Running at the rate of 60 miles an hour, what space would such a train be required in order to come to a stop?

A. Well it would—that is a pretty hard question to answer without figuring it out. Take the speed of a train stopping 100 feet at 25 miles an hour and stopping at 50 miles an hour would be just about the square, and that rule would apply all the way through.

68 Q. So the distance that a train could stop varies at the square of the speed the train was running?

A. Yes.

By Mr. Horan: That is all.

Cross-examination by Mr. Herdman:

69 Q. Mr. Oakford, Second No. 6 on the evening of August 11th, when it received the block restriction card at South Bend, was not thereby given any information as to the schedule of Extra Engine of the train pulled by Extra Engine 1750, was it?

A. No, sir.

70 Q. Would that block restriction card or any other block restriction card received by Second No. 6 on that evening, give the crew any information as to the actual speed or the schedule speed of Extra No. 1750?

A. No, sir.

71 Q. The only information the crew of Second No. 6 would have would be as to the character of the train ahead of it, as to whether freight or passenger?

A. And that it was in the block, that is all.

96 72 Q. When you said that a block restriction card required the train following to reduce its speed to the speed of the train ahead, what do you mean by that? If the train behind in this case, Second No. 6 had no knowledge or information as to the actual speed or schedule speed?

A. I mean by that, that it should run as a freight train ordinarily runs. That is where they cannot see.

73 Q. So that this requirement of a block restrcition card, that in this case Second No. 6 reduce its speed to the speed of the train ahead would apply only on such portions of the track where, by reason of curves or otherwise, the engineer of Second No. 6 could not see that the track was clear ahead?

A. That is it.

74 Q. What restriction, if any, did this particular block restriction card place upon the speed of Second No. 6 where there was a straight track?

A. Not any where he had a perfectly clear view.

75 Q. In other words, is not this the effect of a block restriction card, so far as speed is concerned, that where by reason of curves or other obstructions, a view of the track is broken and obstructed, the train must be moved under control, that is, at such speed as to enable it to be stopped within vision?

A. Yes, sir.

76 Q. Where the track is straight away the same limitation ap-

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plies, that is the train may be run at any rate of speed consistent with stopping it within the distance where the engineer can see the track straight ahead.

A. Yes, that is the way.

97 Redirect examination by Mr. Horan:

77 Q. Mr. Oakford, is it or not customary for one train following another to receive a copy of the orders of the preceding train?

A. A copy of the orders.

78 Q. Are they in any way acquainted or informed of the orders of the train preceding them?

A. No, sir.

79 Q. Would it be true, Mr. Oakford, that Second No. 6 would enter this block without any knowledge whatever of the rate of speed of the preceding train, or of the distance, that is of the number of minutes ahead at which it had entered the block, or any other information which would govern them in the caution with which they were to proceed?

A. I do not clearly understand your question.

80 Q. Is it or not a fact that Extra Second No. 6 entered the block between South Bend and Richfield without knowing the number of minutes ahead of it which 1750 East had passed the station of South Bend?

A. I could not tell you. I have not looked at the records nor at the caution cards.

81 Q. Is it customary when one train is allowed to enter a block in which a preceding train is traveling in the same direction that the train allowed to enter the block is informed of the length of time at which the preceding train entered the block?

A. It should be stated on the block restriction card at the time that they left.

82 Q. Has the train which enters a block in which there is another train traveling in the same direction no information whatever in regard to the rate of speed at which said train has been traveling heretofore.

98 A. No, I might add, if you wish, in regard to the question before the last that where I said it should be stated on the restriction card the book — rules provides that there must be ten minutes elapse before a train—that is the least time that it possibly be—they have to wait 10 minutes before following according to the rule, but the actual time they left should be stated.

83 Q. But they have nothing to tell whether the preceding train was traveling 20 miles an hour, 30 miles an hour or 40 miles an hour?

A. (No answer.)

84 Q. Mr. Oakford, do you know whether or not this extra east engine 1750 was in the control, that is, whether the engineer, conductor and other employes on that train were in the employ of the Rock Island Railroad Company?

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Question withdrawn, also following question and recross examination.

Mr. Mahoney then read the deposition of R. N. Cook as follows.

R. N. Cook of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Direct examination by Mr. Horan:

85 Q. You may state your name.
A. Richard N. Cook.
86 Q. Residence.
A. South Bend, Nebraska.
87 Q. Occupation?
A. Telegraph Operator in that town.
88 Q. For what railroad?
A. Chicago, Rock Island & Pacific.
99 89 Q. Were you on duty as an operator for the Chicago, Rock Island & Pacific on the evening of August 11, 1913?
A. I was.
90 Q. I hand you, Mr. Cook, plaintiff's Exhibit No. 5, and ask you whether or not that is a true copy of the block restriction card which you delivered to train Second No. 6 on the evening of August 11, 1913?
A. Yes, sir.
91 Q. After having issued this block restriction card to Second No. 6, Mr. Cook, when, if at any time, did you again hear from this train?
A. When the operator at Richfield reported the extra east 1750 had been struck by Second No. 6.
92 Q. Do you remember at what time you received this message?
A. I heard the operator at Richfield tell the dispatcher at about 12:35 A. M. on the morning of the 12th.
93 Q. Do you remember the time at which Second No. 6 passed through South Bend and received this restriction card from you?
A. No, sir, I do not now.
94 Q. Did you O. S. Second No. 6 out of South Bend?
A. Yes, sir.
95 Q. Handing you herewith plaintiff's Exhibit No. 6, for the purpose of refreshing your memory, and ask you whether or not to the best of your knowledge this entry 12:18 represents the correct time of Second No. 6 out of South Bend?
A. I believe it is, yes, sir.
96 Q. Mr. Cook, do you remember at about what rate of speed Second No. 6 was traveling through South Bend when you gave them this block restriction card?
A. I should judge from 25 to 30 miles an hour.

By Mr. Horan: That is all.

(No cross-examination.)

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100 Mr. Mahoney read the deposition of Charles Bitzer as follows:

CHARLES L. BITZER, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Direct examination by Mr. Horan:

97 Q. You may state your name.
A. Charles L. Bitzer.
98 Q. Your residence.
A. Fairbury, Nebraska.
99 Q. State, Mr. Bitzer, whether or not on the evening of August 11, 1913, you were in the employ of the Chicago, Rock Island & Pacific Railroad Company.
A. I was.
100 Q. In what capacity were you engaged, Mr. Bitzer?
A. Locomotive engineer.
101 Q. On Second No. 6 running from Lincoln to Omaha?
A. Yes, sir, Fairbury, Nebraska, to Council Bluffs, Iowa.
102 Q. Mr. Bitzer, did you not receive a block restriction card at South Bend, Nebraska, from the operator, Mr. Cook, on the evening or the morning of August 12, 1913?
A. Yes, sir.
103 Q. On the Rock Island track between South Bend and Richfield are there any obstructions or places in the track which require a lowering of the rate of speed?
A. There are two places, or was at that time, the Platte River bridge and over the Missouri Pacific crossing at Meadow.
104 Q. Is there or not a railroad crossing immediately outside of South Bend before the Platte River bridge?
101 A. Yes, sir.
105 Q. There is a railroad crossing there, too? And you may state, Mr. Bitzer, whether or not on the morning of August 12, 1913, you reduced your speed at these points.
A. I did.
106 Q. At the railroad crossing immediately out of South Bend, to what rate did you reduce your speed?
A. About 15 miles per hour, if I remember rightly.
107 Q. And in crossing the Platte River bridge out on this same morning do you remember to about what rate you reduced your speed?
A. About 25 miles per hour.
108 Q. And at the Missouri Pacific crossing at Meadow, do you remember at about what rate you reduced your speed?
A. To about 30 miles per hour, if I can remember rightly.
109 Q. Do you remember about what rate of speed you passed through the village of South Bend on the morning of August 12, 1913, when you received this block restriction card?
A. The village is not on the Rock Island Railroad, but the station and the place where I received this block restriction card is at the

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Burlington railroad crossing at the west end of the Platte River bridge.

110 Q. And at what rate did you reduce your speed there, did you say?

A. Fifteen miles per hour.

111 Q. How far is this point from the Platte River bridge?

A. It is right at the west end of the Platte River bridge.

112 Q. About how, or how long is the Platte River bridge at this end?

A. About half a mile.

113 Q. And you passed over this bridge 20?

102 A. Yes, 15 to 20 miles an hour.

114 Q. And you slowed up at the Missouri Pacific crossing at Meadow?

A. Yes, sir.

115 Q. To about what rate of speed?

A. 25 miles.

116 Q. Now, Mr. Bitzer, would you kindly state about what distance it would take you to slow up from a rate of 50 to 55 miles an hour, to that of 15 or 20 miles an hour?

A. Nearly a quarter of a mile, I should judge, with the train I had.

117 Q. Is it true that it would take you about the same distance or greater, in order to again increase your speed from 15 to 20 to 50 or 55 miles an hour?

A. It would take a longer distance.

118 Q. About how long?

A. About a half a mile.

119 Q. You may state, Mr. Bitzer, whether or not you furthermore reduced speed at the mile board immediately west of the village of Richfield on the morning of August 12, 1913.

A. Yes, sir.

120 Q. To about what rate of speed, Mr. Bitzer?

A. About 30 miles an hour I should judge.

121 Q. You may state whether or not you began at the mile board to slacken speed or whether you had already slackened speed prior to arriving at the mile board?

A. About at the mile board.

122 Q. About what distance, Mr. Bitzer, is it from this mile board to the point at which the wreck on the morning of August 12, 1913, occurred?

103 A. To the point of the wreck, three quarters of a mile.

103 123 Q. Mr. Bitzer, would you further state what is the nature of the track between the villages of South Bend and Richfield as to being straight or having curves.

A. Well it has both straight track and curves.

124 Q. Would you be able to give an estimate of what portion of it in mileage is curving?

A. No, sir.

125 Q. Would you be able to state how many curves there are between Richfield and South Bend?

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A. Six or seven, I do not remember just how many there are.

126 Q. And these curves are scattered are they not at various points along the route?

A. Yes, sir.

127 Q. Would you further state, Mr. Bitzer, whether or not there are located on this stretch of track between South Bend and Richfield any cuts which obstruct the view of a train as to the track in front of it?

A. Yes, sir, there are.

128 Q. Would you further state, Mr. Bitzer, whether or not there are any grades or hills which would necessarily reduce the time of a traveling train?

A. There is, the grade into Richfield.

129 Q. You were traveling then on an upgrade at the time of the accident?

A. Yes, sir.

130 Q. Mr. Bitzer, on the evening of August 11th and the morning of August 12, 1913, you may state whether or not in traveling around the curves which you stated existed on the track between South Bend and Richfield, and in passing through the cuts which obscured the view ahead of your train, whether or not you
104 reduced your train to such a speed that you would have been able to stop within your vision?

A. I did not.

Cross-examination by Mr. Herdman:

139 Q. Mr. Bitzer, you received at South Bend a block restriction card?

A. Yes, sir.

140 Q. What is the purpose of such card?

A. To show me there was a train in the block.

141 Q. That is, it was notice to you that as you left South Bend eastward there was another train ahead of you in the same block?

A. Yes, sir.

142 Q. Now the block eastward from South Bend has its southern terminus where?

A. Richfield.

143 Q. Was that when you left South Bend you knew that there was a train ahead of you somewhere between South Bend and Richfield?

A. Yes.

144 Q. Now receiving one of those block restriction cards as you received such -ard at South Bend on the early morning of August 12th, what duty or obligation did it impose upon you as the engineer of Second No. 6 in the operation of your train?

105 A. My understanding of this card at that time was that I was to reduce speed so that I could stop my train within flagging distance.

145 Q. Well, now what do you mean by within flagging distance?

A. Within three-quarters of a mile.

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146 Q. Your understanding then of the block restriction card so far as it affected the speed of your train or imposed upon you any duty with reference to the speed of your train was that you should operate it so that you could stop within flagging distance, which would be about three-quarters of a mile?

A. Yes.

147 Q. In other words, your understanding was, notwithstanding this block restriction card, that you could operate your train at your schedule speed until you observed a flag?

A. Yes, sir.

148 Q. And you operated your train that night or morning consistent with your understanding of the effect and scope of a restriction card as to speed?

A. Yes, sir.

149 Q. You had a copy of the rules of the company, did you not, governing engineers in the operations of trains and explaining — nature and effect of orders, including block restriction cards?

A. Yes, sir.

150 Q. Were you acquainted with the provisions of said rules?

A. It seems now that I wasn't.

151 Q. I am asking you if you were?

A. Yes, sir, I had passed the required examination.

152 Q. You had been examined, had you not, on the rules?

106 A. Yes.

153 Q. And had passed the required examination?

A. Yes, sir.

154 Q. And at this time, that is on the morning of August 12th, and during the time that you were in the employ of the company you had a copy of the rules in your possession?

A. Yes, sir.

Q. Now with reference to the curves on the Rock Island track between South Bend and Richfield, there is a curve, rather a sharp curve, is there not, a short distance west of the point of the accident?

A. Yes, sir.

155 Q. About what distance west of the point of the accident is that curve?

A. If I remember rightly it is 390 feet.

156 Q. At that curve and immediately to the west thereof, is what is known as the Richfield Hill is it not?

A. Yes, sir.

157 Q. In other words, coming up around that curve, you are also coming up the hill or upgrade, are you not?

A. Yes, sir.

158 Q. Now to the west of this curve just referred to, that is on toward South Bend, how far is it to the next curve?

A. I could not state.

By Mr. Herdman: That is all.

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Redirect examination by Mr. Horan:

Q. Mr. Bitzer, were you acquainted with the nature of the train ahead of you in the block on the morning of August 12, 1913?

A. To the nature, that is, a freight train.

107 160 Q. You knew it was a freight train?

A. Yes, sir.

161 Q. Did you have information as to the rate of speed this train was to travel this distance?

A. The rules required a speed of 35 miles per hour for freight trains.

162 Q. The maximum or minimum rate of 35 miles an hour?

A. They could not travel more than 35 miles an hour.

163 Q. And the book of rules would furthermore require this freight train to slow down in crossing this Platte River bridge of 10 or 12 miles an hour?

A. 25 miles an hour.

164 Q. And it would require the freight train to slow down in crossing the Missouri Pacific at Meadow?

A. 25 miles per hour.

165 Q. And you were furthermore acquainted with the fact that this train was not more than 12 or 13 minutes ahead of you in this block, were you not?

A. No, sir.

166 Q. You had no intimation how far ahead of you it was?

A. No, sir.

167 Q. You knew that it must be at least 10 minutes ahead of you, did you?

A. Yes, sir.

168 Q. And you knew that the distance between Richfield and South Bend being 12.8 miles an hour that this train could not consistently under the rules cover it in less than about 27 or 28 minutes, did you not?

Objected to as incompetent, irrelevant, immaterial calling for a conclusion.

108 The Court: The objection is overruled.

To which ruling of the court the defendant by its counsel, excepted.

A. Yes, I did not know whether this train had been gone 10 minutes or one hour. I knew nothing as to their time at any point. That block restriction card did not state what time they left South Bend.

169 Q. Is it not true, Mr. Bitzer, that this block restriction card should state the time at which the preceding train entered the block?

Objected to as incompetent, irrelevant, and for the further reason that the answer sought to be elicited is a matter that is fixed and governed by the printed rules of the company heretofore submitted in evidence, and calling merely for an expression of opinion on the part of the witness.

The Court: The objection is sustained.

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To which ruling of the court the plaintiff, by his counsel, excepted.
Mr. Horan: I believe that is all.

Recross-examination by Mr. Herdman:

170 Q. You knew under the rules that train was at least 10 minutes ahead of you in leaving South Bend?
A. Yes, sir, should have been.

Mr. Mahoney read, without objection the deposition of W. W. Cameron, which is as follows:

109 W. W. CAMERON of lawful age, being by me first duly examined cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Direct examination by Mr. Horan:

171 Q. You may state your name.
A. W. W. Cameron.
172 Q. Your residence.
A. Fairbury, Nebraska.
173 Q. State Mr. Cameron, whether or not on the evening of August 11th, 1913, you were in the employ of the Chicago, Rock Island & Pacific Railway Company.
A. I was.
174 Q. You may state your duties as such employe at that time.
A. I was train master in charge of transportation matters.
175 Q. And by virtue of such employment one of your duties was to arrange for the making up of routing of the Extra East Engine 1750 on the evening of August 11th, was it?
A. Yes, sir, at Lincoln.
176 Q. Mr. Cameron, are you familiar with the meaning of the different form orders delivered to conductors and engineers on the Rock Island System?
A. Yes, sir.
177 Q. Are you familiar with the form order called a block restriction card?
A. Yes, sir.
178 Q. What should be the effect upon a train crew receiving such an order in entering into a block occupied by a train moving in the same direction?
A. Move with caution, under control.
110 179 Q. What is the teaching of the Rock Island System to its employes, as the meaning of "proceeding with caution"?
A. Simply as covered in the book of rules.

By Mr. Horan: That is all.
(No cross-examination.)

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(O. B. Olson—Direct Examination.)

Mr. Mahoney read, without objection the deposition of O. B. Olson, as follows:

O. B. Olson, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows: viz:

Direct examination by Mr. Horan:

180 Q. State your name.
A. O. B. Olson.
181 Q. Your residence.
A. Fairbury.
182 Q. You may state whether or not on the evening of August 11, 1913, and the morning of August 12, 1913, you were in the employ of the Chicago, Rock Island & Pacific Railroad Company.
A. Yes, sir.
183 Q. In what capacity, Mr. Olson?
A. Train Dispatcher.
184 Q. Where was your location?
A. Fairbury.
185 Q. As train dispatcher at Fairbury, Nebraska, was it your duty to deliver and give orders to the trains of the Chicago, Rock Island & Pacific in that division?
A. No, sir I do not deliver the orders, I issue the orders.

Mr. Horan: That is all.

(No cross-examination.)

111 *Frank S. Brooks—Direct Examination.*

Mr. Mahoney read without objection, the deposition of Frank S. Brooks, as follows:

Frank S. Brooks, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Direct examination by Mr. Horan:

186 Q. You may state your name.
A. Frank S. Brooks.
187 Q. Your residence, Mr. Brooks.
A. Fairbury, Nebraska.
188 Q. State whether or not on the evening of August 11th, and the morning of August 12, 1913, you were in the employ of the Chicago, Rock Island & Pacific Railroad Company.
A. Yes, sir.

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189 Q. What is your occupation as such employe?

A. Conductor Section 6.

190 Q. What run did you make on Second 6?

A. Come from Phillipsburg to the point where we had the accident, Richfield.

191 Q. You may state, Mr. Brooks, whether or not on the morning of August 12th, in passing through the village of South Bend, Nebraska, you received from the operator there a block restriction card.

A. We did.

192 Q. What effect, if any, did the receiving of this block restriction card have in your conduct of Second No. 6 on this morning.

A. Well we received this block restriction card.

193 Q. Just in your own personal management of the train, that is whether it caused you to take any steps you may not have taken otherwise?

A. In my case I do not know as it had any effect.

112 194 Q. You remember after leaving South Bend on the morning of August 12th whether the train Second No. 6 reduced speed at the crossing immediately east of South Bend?

A. It did.

195 Q. And crossing the Platte River bridge?

A. Yes, sir.

196 Q. You remember at about what rate of speed you passed over the Platte River bridge and this crossing at South Bend?

A. About 25 miles an hour.

197 Q. Do you further remember whether or not in making the crossing at Meadow on the morning of August 12th, the train on which you were conductor, reduced speed?

A. Yes, sir, we reduced speed for cemaphore.

198 Q. Do you remember to about what rate of speed you reduced Second No. 6?

A. To about 25 miles an hour.

199 Q. You remember, Mr. Brooks, whether or not Second No. 6 reduced its speed at any other points between South Bend and the point of the accident at Richfield?

A. Well I do not know of any in particular, did not notice.

200 Q. You remember, Mr. Brooks, whether or not in the road bed between South Bend and Richfield whether there are any curves or cuts which interfere with the clear view on front of the train?

A. Well I think there was only one on this hill besides the point where we had this accident.

201 Q. Only one curve?

A. Yes, sir, where the view is obstructed for any distance.

202 Q. How long a distance were you able to see the track ahead on this run?

113 A. Well, in different places you see different lengths. There is one place where we could see a distance of two miles or three, and then there are places where we could see a half a mile, varying from one half to one quarter in different places.

203 Q. Are you familiar, Mr. Brooks, with the distance required

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to stop a train such as Second No. 6 was, on this morning running at the rate say 20 miles an hour?

A. Yes, sir.

204 Q. Is it an accepted doctrine in railroading that the distance in which a train can be stopped varies according to the square of the rate of speed? In other words, if a man is traveling at the rate of 20 miles an hour, one train traveling 20 miles and one traveling at the rate of 40 miles an hour the train traveling 40 miles an hour would take about four times as long a distance to come to a stop as the one at the rate of 20 miles an hour?

A. I do not know as it would take four times as long, but probably about twice, twice the distance.

205 Q. About how long a distance would be required to stop such a train as Second No. 6 traveling at the rate of 50 miles an hour.

Mr. Herdman: Objected to as incompetent, irrelevant and immaterial and no sufficient foundation laid.

The Court: *The Court*: The objection is overruled.

To which ruling of the court the defendant, by its counsel, excepted.

A. About 400 feet.

206 Q. Mr. Brooks, in approaching the city of Richfield, about what extent of clear track has the road bed?

A. I think it has about 300 feet they estimate it.

207 Q. Is it not true, Mr. Brooks, that immediately west of the village of Richfield there is a curve in the track?

A. Yes, sir.

208 Q. And west of this curve, what extent of clear track does the road bed furnish?

A. Well, about the distance of half a mile before we approach this curve we can see.

209 Q. Do you, Mr. Brooks, know whether or not in traveling over this half mile preceding this curve that Second No. 6 reduced its speed on the morning of August 12th, 1913?

114 A. No, sir, it did not reduce its speed.

210 Q. You may state, Mr. Brooks whether or not the receiving of this block restriction card at South Bend placed upon you the duty of restricting the speed of your train to your understanding of the rules of the Rock Island Railroad Company?

A. I do not think it did.

211 Q. Your understanding of the rules should it affect the speed of your train?

A. No, I do not think so, not the way I understand it.

212 Q. Mr. Brooks, is it not true that in your examination before the State Railway Commission on August 15, 1913, that you stated that your understanding of the rule was that the reception of this card should reduce the speed of your train to that of the train you were following?

A. Yes, we should not exceed their speed.

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213 Q. That was your understanding and that was your testimony before the Railroad Commission, was it not, Mr. Brooks?

A. Yes, sir I believe that is the way I did.

214 Q. Did the duty of determining the speed of the Second No. 6 fall to any extent upon you, or was it entirely the duty of the engineer to regulate this speed?

A. Well, it was the duty of the engineer.

Mr. Horan: That is all.

115 Cross-examination by Mr. Herdman:

215 Q. Mr. Brooks, you stated that at South Bend "we" received a block restriction card, whom did you mean and include by the term "we."

A. The engineer and myself.

216 Q. A copy of the block restriction card is given to the engineer?

A. Yes.

217 Q. And another copy to the conductor?

A. Yes, sir.

218 Q. Now what does a block restriction card tell the engineer and the conductor receiving it?

Not answered.

219 Q. What is the purpose of a block restriction card?

A. It is to let them know that the block is not clear.

220 Q. By that do you mean that there is a train ahead in the same block?

A. Yes, sir.

221 Q. Now you speak of your understanding of the rules, is it not a fact that a block restriction card is information that there is a train ahead in the same block, and for your train to proceed with caution?

A. Yes, with caution.

222 Q. What does "with caution" mean in a railroad sense as applied to speed?

A. It means that we are supposed to look for danger ahead. A man figuring that a block is clear he is not looking for anything, and on the other hand he is where you get a block restriction card.

116 223 Q. Does a block restriction card impose upon the conductor receiving it any duty with reference to the speed of the train?

A. Not in the case of a passenger train.

224 Q. Second No. 6 of which you were a conductor was a passenger train?

A. Yes.

225 Q. Now does a block restriction card impose, under your understanding of the rules, impose upon the engineer of the train any duty with reference to the rate of speed at which he shall proceed, other than to keep his train under control, that is, so that he

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can stop it within the distance within which he perceives the track to be clear?

A. No, it does not impose any further duty on him.

226 Q. Now do you have any information when receiving a block restriction card as to the rate of speed at which the train ahead of you is running?

A. No, we do not.

227 Q. Do you have any information as to whether the train ahead of you is a regular train or an extra?

A. Yes, in this case we had, a block restriction card showed that Extra 1750 was ahead.

228 Q. Were you advised as to the character of that train?

A. No, sir.

229 Q. Were you advised as to the schedule or rate of speed at which that train was running, or was supposed to run?

A. No, sir, none at all.

230 Q. Was there anything on the orders or the block restriction cards received by you that gave you that information?

A. No.

117 231 Q. Now immediately west of Richfield there is a long and rather sharp curve, is there not, in the Rock Island track?

A. Yes, sir.

232 Q. And that curve is built through a cut, is it not?

A. Yes, sir.

233 Q. And on the left hand side, looking east, there are, which would be on the inside of the curve, there are high banks of earth, are there not?

A. Yes, sir, on both sides.

234 Q. But particularly on the outside of the curve?

A. Yes.

235 Q. So that the engineer of a train approaching this curve from the west could not see across the curve and ascertain whether the track was clear, is that correct?

A. Yes.

236 Q. His view would be obstructed by the banks of the cut?

A. Yes, the banks of the cut and the curve.

237 Q. Now from the point where the collision occurred, at what point west, that is, how many feet west of the point where the collision occurred would the engineer of Second No. 6 or the fireman in the cab of the engine of No. 6 have a view of the place where the collision occurred?

A. Well, about 300 feet I should judge the distance is.

Mr. Herdman: That is all.

Redirect examination by Mr. Horan:

238 Q. Mr. Brooks you may state whether or not the Chicago, Rock Island & Pacific Railroad Company allowed you to make your

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own interpretation of the meaning of this book of rules, or
118 whether it furnished you any additional instruction as to the meaning of these rules.

A. Well, they furnished us instructions at the time the book was adopted.

239 Q. And you were furnished these instructions, you were instructed in this way, were you?

A. Yes, sir.

240 Q. Mr. Brooks, you may further state whether or not you are familiar with the fact that under the Rock Island rules a passenger train is not admitted into the same block with another passenger train.

A. Yes, I am familiar with that part of the rules.

241 Q. And you were therefore familiar on the morning of August 12th, 1913, that the preceding train could not be a passenger train, were you not?

A. Yes, sir.

242 Q. And you were from your knowledge of railroading and the rules of the Rock Island Railroad Company, further familiar with the fact that the speed of the preceding train was limited to that of 35 miles an hour, were you not?

A. Yes, that is the understanding I had.

243 Q. And further, Mr. Brooks, from your experience in railroading you were familiar, were you not, with the fact, that on account of the necessary reduction of the speed that a freight train must make in crossing over the Platte River and the various crossings between South Bend and Richfield, as well as from the nature of the road bed, that a freight train would not be able to average for the entire distance of 12.8 miles between these points its maximum speed of 35 miles an hour?

119 A. Well it would be possible for them to do it if they had a light train.

244 Q. It would be necessary for them to break the rules of the company to make this rate of speed between the Platte River bridge and the other crossings already spoken of?

A. Well this distance of the Platte River bridge is very short, that is 25 miles an hour.

245 Q. They are supposed to reduce for half a mile across this bridge to a rate of not more than 25 miles an hour, as well as to reduce to that rate at the crossings?

A. Yes, sir.

246 Q. And, furthermore, it would take them some little distance after having made this reduction to regain their maximum speed of 35 miles an hour?

A. Well, it would not take very long, very short distance.

247 Q. Is it not furthermore your experience as a railroad man, Mr. Brooks, that it is not possible for a train to constantly attain its maximum speed?

A. Yes, it is possible.

248 Q. Is it customary?

A. Well, that is hard to say, it is sometimes customary to ex-

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ceed it and sometimes to fall below it. It is hard to hold the speed up to 35 miles an hour.

249 Q. As an average, however, is it not true that freight trains make less than their maximum as well as passenger trains make less than their maximum?

(No answer.)

Mr. Horan: That is all.

120 Further recross-examination by Mr. Herdman:

250 Q. Mr. Brooks, this speed you speak of 35 miles an hour, that is simply your understanding of the limitations of the Rock Island Railroad Company as to trains other than passenger trains?

A. Yes, sir.

251 Q. Do you know whether that is the maximum speed or whether that is the average speed under the rules?

A. That is the average speed.

252 Q. So that at times freight trains might run somewhat in excess of 35 miles and at other times somewhat less than 35 miles an hour?

A. Yes, sir.

253 Q. In railroading is it practicable or even possible for an engineer to maintain continuously his train at a fixed rate of speed?

A. It is almost impossible.

254 Q. In other words, the grade of the track has a great deal to do with it, does it not?

A. Yes, it does.

255 Q. A train moving say 30 miles an hour on level track, when it strikes an upgrade will slow down somewhat?

A. Always.

256 Q. And on the other hand when it strikes down grade its speed will be accelerated somewhat?

A. Yes, sir.

257 Q. And between South Bend and Richfield or the point where the collision occurred there was both up-grade and down-grade as well as level track was there not?

A. Yes, sir.

Mr. Herdman. That is all.

121 Redirect examination by Mr. Horan:

258 Q. Mr. Brooks, you may state whether or not the Rock Island Railway Company gives its employees the privilege of using their discretion in over-stepping the rules it gives them when they see fit?

A. It does not do that, it requires you to stick to the rules.

259 Q. So it is a fact is it not, Mr. Brooks, if there was in existence a rule making the maximum rate of speed, that is, the greatest possible rate of speed for freight trains to be 35 miles an hour, the men in charge of the freight train would not have

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authority to attain a greater speed, and you would have no reason to expect that they would attain a greater speed?

Mr. Mahoney: Objected to as incompetent, irrelevant and immaterial and not the best evidence, as under the answer of the witness heretofore made, the rules are the only evidence on that question.

The Court: The objection is overruled.

To which ruling of the court the plaintiff, by his counsel, excepted.

A. No, we would not expect them to.

Mr. Horan: That is all.

Mr. Mahoney read, without objection the deposition of
122 Bert Thornton, as follows:

BERT THORNTON of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Direct examination by Mr. Horan.

260 Q. You may state your name.

A. Bert Thornton.

261 Q. Residence.

A. Fairbury, Nebraska.

262 Q. You may state whether or not on the morning of August 12, 1913, you were employed by the Chicago, Rock Island & Pacific as brakeman on Second No. 6, running between Fairbury and Omaha or Council Bluffs.

A. I could not state as to the exact date.

263 Q. That is the date of the accident.

A. Yes, sir.

264 Q. You may state whether or not you were aware that the conductor and engineer of Second No. 6 received a block restriction card from the operator at South Bend.

A. They did.

265 Q. Do you remember Mr. Thornton, whether or not Second No. 6 was traveling at a high rate of speed in approaching the village of Richfield.

A. A moderate rate of speed.

266 Q. What is your understanding of a moderate rate of speed, Mr. Thornton?

267 Q. Why, 30-35 miles an hour.

123 Q. What would be your idea of a high rate of speed?

A. From 60 up.

268 Q. And is it not true that on the hearing before the State Railway Commission on August 15, 1913, in regard to this accident that occurred at Richfield that you stated that Second No. 6 was traveling at a pretty high rate of speed?

A. I do not remember.

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269 Q. What would be your idea, Mr. Thornton, of a pretty high rate of speed? ?

A. I think I have answered that.

270 Q. You have answered that of a high rate and a moderate rate you use this expression "pretty high rate", I would like to know what your idea of a pretty high rate of speed would be?

A. Well it would be 50 to 60 miles.

271 Q. Mr. Thornton, from your knowledge of the rules of the Rock Island Railroad Company and from the instructions that you have received as an employe of the Rock Island Railway Company, would you consider it your duty as a conductor of a train to signal the engineer for a lower rate of speed if you considered he was exceeding his orders?

A. I did.

272 Q. Mr. Thornton, would you further state whether or not it is not customary for conductors to first serve an apprenticeship as brakeman on trains before they are promoted to the position of conductor?

A. Yes, sir.

273 Q. And you would further state, Mr. Thornton, whether or not in their apprenticeship as brakeman they are not supposed to familiarize themselves with the duties of a conductor in order
124 that they may be able to properly perform such duties when they are given the position as conductor?

A. Yes.

274 Q. You may state further Mr. Thornton, whether or not in your opinion Second No. 6 in traveling around this curve approaching Richfield was exceeding the speed to which they were limited by the block restriction card given them at South Bend.

A. I cannot say.

Cross-examination by Mr. Herdman:

275 Q. You were brakeman on Second No. 6 at the time of the collision in controversy?

A. Yes, sir.

276 Q. You were not a conductor?

A. No, sir.

Q. Were you up to that time ever a conductor?

A. Yes, sir.

277 Q. On the Rock Island?

A. Yes, prior to that time.

278 Q. Regular conductor?

A. Extra conductor.

279 Q. How long prior?

A. Promoted the 13th day of February, 1911.

280 Q. And how long did you hold the position of conductor?

A. Up to date.

281 Q. But on this particular run you were serving as brakeman?

A. Yes, sir.

282 Q. Mr. Thornton, does the brakeman under the rules of the

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Rock Island Company in force at the time of this collision have anything to do with the control of the operation of the train?

125 A. No, sir.

283 Q. A braleman simply carries out and executes such orders as may be given by those in charge of the train?

A. Yes.

284 Q. You say you know the engineer on Second No. 6 received a block restriction card at South Bend?

A. Yes, sir.

285 Q. How do you know that?

A. He showed me it.

286 Q. That is customary, is it not, to show the brakeman the orders received with reference to the operation of the train?

A. It is.

Redirect examination by Mr. Horan:

287 Q. Is it not the duty of a brakeman on a train to take the place of a conductor in case same has been disabled like sickness or some accident would render him incapable of performing his duties while on a trip?

A. No.

288 Q. What would be necessary in a case of that kind?

A. They would call a conductor.

289 Q. Suppose the accident occurred between a block and the conductor fainted or something of that kind, whose duty would it be to look after the train until you got to where you could call a conductor?

A. It would be up to the brakeman and the engine crew.

Mr. Herdman: That is all.

126 Recross-examination by Mr. Herdman:

290 Q. Mr. Thornton, what duty does a block restriction card impose with reference to the operation of the train?

(Not answered.)

291 Q. That is having received a block restriction card at South Bend what duty did the card impose with reference to the operation of Second No. 6?

A. Caution card is what you mean?

292 Q. Yes, sir.

A. It means caution, to look out for a train within the block, to run under control.

293 Q. What does run under control mean?

A. Within the distance that seemed to be clear, that you could stop a train.

294 Q. That is you must keep your train under control, that you can stop it within the distance that you can see a clear track ahead?

A. Yes, sir.

295 Q. Does a caution card or a block restriction card impose upon any one of the crew the duty of running at any given rate of speed, that is number of miles per hour?

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A. Yes.

296 Q. What?

A. Why for instance like No. Second 6, to run within the speed of the train that is within the block.

297 Q. What knowledge did you have of the speed of that train, or would you have?

A. It would be classed the same as a freight train of that class, that is the way we would figure.

127 298 Q. Suppose you had a clear track ahead of you?

A. 55 on a tangent and 60 miles on straight track.

Q. In other words, notwithstanding Second No. 6 received a caution or block restriction card it could proceed at the rate of 60 miles an hour on tangent track or 55 miles an hour on curved track, provided the engineer at all times kept his train under such control that he could stop within a distance that he could see the track was clear ahead.

A. No, sir.

299 Q. What does it mean?

A. He could run within the speed limit of a train that is within the block.

300 Q. What is the speed limit of that train?

A. 35 miles an hour.

301 Q. Notwithstanding the engineer of No. 6 might have a stretch of tangent track ahead of him, free and clear of any obstruction, he could not proceed at a rate of speed in excess of 35 miles an hour on that tangent track?

A. Yes, sir.

302 Q. That is what is meant by under control?

A. Well, as soon as you can stop your train within the distance.

303 Q. And if you had a tangent track ahead of you you could run 60 miles an hour?

A. That is not according to the instructions of a caution card.

304 Q. You say in one breath it means under control, and then again you say it means not exceeding 35 miles an hour.

128 A. That is you are to stay within the speed of the train that is within the block.

305 Q. Notwithstanding you might have a clear track ahead of you and able to run 60 miles an hour and stop within the distance you could see?

A. I would not say you could. I do not believe I understand your question.

306 Q. Between South Bend and Richfield there are some stretches of tangent?

A. Straight track, yes, sir.

307 Q. There is one piece of tangent track in there that is two miles or more long?

A. Yes.

308 Q. Engineer of Second No. 6 having received this caution card at South Bend, when he approaches this stretch of tangent track upwards of two miles long, and he sees that it is free and clear of all

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obstruction, what rate of speed, under the rules, was he entitled to proceed over that tangent track?

A. The rate of speed of the train within the block.

309 Q. In other words you would say he was tied down to 35 miles an hour regardless of the tangent track ahead of him, regardless of the fact that it is free and clear of obstruction, and regardless of the fact that he could stop his train in the distance that he could see the track clear?

A. Yes, sir.

310 Q. So that your understanding of a caution card is that it absolutely limits the second train to the schedule of the train preceding it?

129 A. Yes, sir.

311 Q. Regardless of the fact whether the schedule of that train is five miles an hour of 50 miles an hour?

A. Yes, sir.

312 Q. I hand you the book of rules submitted in evidence as plaintiff's exhibit 8, and ask you to indicate the rule therein that limits a train receiving a block restriction or caution card to the speed of the train preceding it in the block.

A. I do not think I will find it, but that is the way we were instructed when we were examined in regard to it.

313 Q. Calling your attention to plaintiff's exhibit 5, being the caution card or block restriction card issued to the engineer and conductor of Second No. 6 at South Bend on the morning of August 12th, I would ask you to state what restrictions with reference to the rate of speed at which No. 6 should proceed is imposed by that restriction card, under the rules of the Rock Island Railway Company?

A. It is just a caution card is what it is.

314 Q. Does a caution card such as Exhibit 5 limit the train receiving it to any particular rate of speed?

A. Yes.

315 Q. What rate of speed?

A. Within the speed limit of the train within the block.

316 Q. Would you please refer to plaintiff's exhibit 8, the same being the rules and regulations of the operating department of the Rock Island Railway Company, and indicate therein any rule so limiting the speed of the train receiving a block restriction card of the form of plaintiff's exhibit 5?

130 A. I do not find anything in here. Rule 332, is that something near what you want to get at, on page 80? 381 and 382 is the nearest I can find to anything that would——

317 Q. You do not see anything in the rules that limits the speed of a train receiving a block restriction or caution card to the schedule of the train preceding it in the block?

A. No, sir.

Redirect examination by Mr. Horan:

318 Q. Mr. Thornton, in your manner of conducting trains are you limited solely to the knowledge you obtained by interpreting

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this book of rules or are you further instructed as to your conduct by properly delegated officials of the railroad company?

Mr. Herdman: Objected to as incompetent, irrelevant and immaterial and not within the issues in the case, and no sufficient foundation being laid and calling for the opinion of the witness as to what constitutes properly delegated officials of the railroad company.

The Court: The objection is overruled.

To which ruling of the court the defendant, by its counsel, excepted.

A. We are.

319 Q. Mr. Thornton, you may state whether or not you were instructed as to your duties by men whom you knew to be in the employ of the Rock Island Railway Company and who were your superiors.

Mr. Herdman: Objected to as incompetent, irrelevant, and immaterial, no sufficient foundation laid, and calling for the opin-
131 ion of the witness as to what constitutes proper instruction or who is properly delegated authority of the railroad company.

The Court: The objection is overruled.

To which ruling of the court the defendant, by its counsel, excepted.

A. We are instructed by—I do not know what his initials are,—Hope, trainmaster.

By Mr. Horan: That is all.

Further recross-examination by Mr. Herdman:

320 Q. What was the form of these instructions, written?

A. I tell you how it come——

321 Q. Was this instruction before or after this collision?

A. Before, because I was gone from here several years.

322 Q. Was this instruction verbal or written?

A. It was verbal.

323 Q. It is simply in the course of a talm or conversation?

A. No sir, they changed the book of rules and they took us in classes.

324 Q. When was the change in the book of rules?

A. This will tell it (Referring to book of rules), took effect April 1, 1910.

325 Q. After the book of rules, plaintiff's exhibit 8 was adopted?

A. Yes.

326 Q. And you say Hope, the train master, instructed you that the rules of the company required a train receiving a caution or block restriction card, such as plaintiff's exhibit 5, to proceed in the block at a speed not greater than that of the train ahead of it?

132 A. Yes, sir.

Mr. Herdman: That is all.

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Mr. Mahoney read, without objection, the deposition of Joseph W. King, as follows:

JOSEPH W. KING, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Direct examination by Mr. Horan:

327 Q. You may state your name.
A. Joseph W. King.
328 Q. Your address?
A. Fairbury, Nebraska.
329 Q. State whether or not on the evening of August 11th and morning of August 12th, 1913, that being the date of the wreck at Richfield, you were in the employ of the Chicago, Rock Island & Pacific Railway Company.
A. Yes, sir.
330 Q. In what capacity were you employed?
A. Fireman.
331 Q. On Extra 1750 east?
A. Yes, sir.
332 Q. Mr. King, you may state your remembrance of the rate of speed at which you approached the village of Richfield on the morning of August 12, 1913.
A. Why, we were going about forty miles, something like that, until we got to the siding and then we were going 5 miles, 10 or something like that.
333 Q. You may state whether or not between the village of South Bend and the village of Richfield you suffered any accident or delay which caused any unnecessary delay on the part of train 1750 east?
A. There was. I do not know whether it was at that station or the station back, there was an air hose busted on the brakes, but I know it was in there somewhere.
334 Q. You may state, Mr. King, whether or not within the two miles of track immediately west of Richfield you made no stop.
A. No, sir.
335 Q. You slowed up for the siding and started to enter the siding without any unusual delay?
A. Yes, sir.
336 Q. Did you stop your train at all in slowing up to take the siding?
A. No, sir.
337 Q. You were traveling, you say, at the rate of 5 miles an hour in entering the siding?
A. Yes, sir.

By Mr. Horan: That is all.

Cross-examination by Mr. Herdman:

338 Q. You knew that your train was to take the siding at Richfield?

A. Yes, sir, that is the instruction the engineer give me.

339 Q. Did he show you the orders he had?

A. Yes, sir, and read them to I and the head brakeman.

340 Q. Is it customary and do the rules require that an engineer show or read his orders to the fireman?

134 A. Yes, sir.

341 Q. So far as you know and can recall at this time, after leaving South Bend, until the time of this collision, your train made a continuous run, that is, without any stops?

A. Yes, sir.

342 Q. Now until you got to where you slowed down to take the siding at Richfield, you say you ran about 40 miles an hour?

A. Yes, sir, I should judge. Of course I am not very well acquainted with speed. Yes, sir, that is my opinion.

343 Q. When you got near the siding at Richfield you slowed down to about five miles an hour?

A. Yes, sir.

344 Q. And the head brakeman, was he riding on the engine at that time?

A. On the pilot of the engine.

345 Q. And he dropped off to go ahead and move the switch?

A. Yes, sir.

346 Q. And your train was all the time moving?

A. Yes, sir.

347 Q. And the engine of your train had entered the switch before the collision occurred?

348 Q. A goodly part of the train had passed the switch?

A. I counted the next morning six or seven cars out in the main track.

349 Q. And do you know how many cars you had in your train?

A. Thirty some, I think.

135 350 Q. That is counting caboose and the sleeping cars?

A. Yes, sir.

351 Q. Your train was made up largely of flat cars and stock cars loaded with circus paraphernalia?

A. Yes, sir.

352 Q. You say that at that time you were in the employ of the Chicago, Rock Island & Pacific Railway Company. Do you know or have any knowledge or information as to any contract between the Rock Island Railway Company and the circus people, concerning the movement of that train, do you know anything about such a contract?

A. No, sir.

353 Q. And so when you say that you were in the employ of the Rock Island Railway Company you are speaking with reference to your general employment?

A. Yes, sir.

354 Q. You don't know as to just for whom you were acting at the time you were pulling that circus train, do you, other than being generally in the employ of the Rock Island Railroad you assumed you were acting for it?

A. Yes, sir.

Redirect examination by Mr. Horan:

355 Q. You were hired by the Rock Island Railway Company, were you not?

A. Yes, sir.

356 Q. And you gave the Rock Island Railway Company no authority to lease out or turn your services over to any other company or concern whatever, did you?

Mr. Herdman: Objected to as incompetent, irrelevant and immaterial.

136 The Court: The objection is overruled.

To which ruling of the court the defendant, by its counsel, excepted.

A. No, sir.

357 Q. Have you any, or rather, what is your idea as to the length of time which intervened between your entering of the curve approaching Richfield and the time of the accident?

A. You mean the last curve before we took the siding?

358 Q. After you entered that curve shutting off the back view, how long was it before the other train struck you?

A. When we were going onto the siding Mr. Bell said to look back and see if you can see anything of the other train, I just turned around——

359 Q. The only thing I want to know is the length of time between the time you entered that curve until the train struck, was it one minute, two minutes, or five minutes?

A. Five minutes.

360 Q. How great is the distance between the opening of the curve and the point at which the passenger train struck your train?

A. That I could not say as to that, I am not very well acquainted with the road.

361 Q. Would you say it was more than a mile? There is a mile post immediately outside of Richfield, is there not?

A. Yes, sir.

362 Q. Does the curve begin west or east of this mile post?

A. West.

363 Q. How far west of this mile post?

A. That I could not say just exact.

137 364 Q. It does not extend as far west as the second mile post outside of Richfield, does it?

A. Oh, no.

365 Q. Does it extend half way to the second mile post?

A. Something like that I should judge.

366 Q. And the mile post is just about a mile outside of Richfield, is it?
A. Yes, sir.
367 Q. And you say you traveled approaching Richfield at the rate of about 40 miles an hour?
A. I s-ould judge something like that.
368 Q. Now how far from the siding did you slow down to the rate of five miles an hour, as you have previously stated?
A. I could not tell just exactly, he done just the same as he did in the other siding, gradually reduced the speed down.
369 Q. Where did he begin to reduce speed?
A. That I could not tell. I was busy a good share of the time. Of course I did not watch just where he—a fellow would not take notice of anything like that.
370 Q. And you do not know whether he began to reduce speed before or after he reached this mile post?
A. No, I could not say.

Recross-examination by Mr. Herdman:

371 Q. Mr. King, the mile post you speak of is a mile west of the station house at Richfield, isn't it?
A. Yes, sir.
372 Q. It is supposed to mark the one mile distance from the station house?
138 A. Yes, sir.
373 Q. The switch leading into this siding which your train was to take at Richfield is also west of the station house, isn't it?
A. Yes, sir.
374 Q. It is about midway between, isn't it?
A. Yes, sir.
375 Q. This curve, the first curve west of Richfield and west *west* of this switch is rather a long curve, isn't it?
A. Yes, sir.
376 Q. And it is almost a mile long?
A. I should judge, yes, sir.
377 Q. And then immediately the other side of that first curve is a second reverse curve?
A. Yes, sir.

Mr. Herdman: That is all.

Redirect examination by Mr. Horan:

378 Q. About how far west of Richfield is there such a curve, or are there such obstruction along the side of the track as to interfere with the view eastward?
(No answer.)
379 Q. When you strike that slight curve west of Richfield you are still able to see the track clear for some distance ahead, are you not?
A. Yes, sir.

380 Q. And it is only when you enter the second curve immediately west of Richfield that there is anything to prevent a clear view of the track ahead, is that not true?

A. Yes, sir.

381 Q. And the second curve is only a rather short distance west of Richfield, is it not?

139 A. Yes, sir.

Recross-examination by Mr. Herdman:

382 Q. The first curve carries you over a mile the other side of Richfield?

A. I should judge that that was the distance.

383 Q. And then on beyond that is the second curve west of Richfield?

A. Yes.

384 Q. It was dark when you came along there that night?

A. Yes, sir.

385 Q. Are you very familiar with that stretch of Rock Island track?

A. No, sir; I am not.

386 Q. Did you have a regular run over it at that time?

A. No, sir.

387 Q. Have you had since?

A. No, sir.

388 Q. You are an extra man on that run?

A. Extra freight man.

389 Q. So you are not familiar with the distance and location of curves?

A. No, sir.

390 Q. Or whether the view of the track was open to the engineer?

A. No, sir.

391 Q. Mr. King, do you know when your engine got to the switch to take the siding at Richfield the rear of your train was still in that first curve?

A. Yes, sir; it just come out, or when we see the headlight of the other train it just flashed over it. It seemed that we had come out of the curve to my recollection.

392 Q. Did you see that headlight just before it hit you?

A. Yes, sir.

140 393 Q. Did you see that headlight before you passed the switch?

A. No, sir.

394 Q. You saw it after a part of your train had passed the switch and gone on to the siding?

A. Yes, sir.

395 Q. You don't know for what distance the rear of your train could have been seen by the engineer on Second No. 6, the passenger that hit you?

A. No, sir.

Mr. Herdman: That is all.

I, P. H. Smalley, Notary Public, do hereby certify that William Charles Cavanag, J. A. Dickens, W. D. Oakford, R. N. Cook, Charles L. Bitzer, W. W. Cameron, O. B. Olson, Frank S. Brooks, Bert Thornton and Joseph W. King, were by me first severally duly sworn to testify the truth, the whole truth and nothing but the truth, and that the depositions were first taken in shorthand in the presence of the witnesses, and afterwards extended on the typewriter by myself, and were taken at the time and place in the annexed stipulation specified; that I am not counsel, attorney or relative of either party, or otherwise interested in the event of this suit; and said depositions were commenced at the time in said stipulation specified, and continued and completed on the following day.

In testimony whereof I have hereunto set my hand and official seal this 26th day of January, 1914.

[SEAL.] P. H. SMALLEY,
Notary Public.

141 J. E. SUMMERS, a witness, called and sworn on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Mahoney:

396 Q. Your name is J. E. Summers?
A. Yes, sir.
397 Q. Your calling is a surgeon?
A. Yes, sir.
398 Q. How long have you been practicing the calling of surgery?
A. Thirty-three years.
399 Q. Of what medical college are you a graduate?
A. Columbia University, New York.
400 Q. When did you graduate?
A. In 1881.
401 Q. Since your graduation at Columbia University have you taken post graduate studies in your profession?
A. Yes, sir.
402 Q. And where have you taken such post graduate work?
A. In Vienna, Berlin and London. And I visited most of the medical centers.
403 Q. How much time have you put in in that post graduate work in Europe?
A. Two years. I put in two years on one occasion and some months on another.
404 Q. Since your graduation from Columbia have you devoted your practice to surgery, or has your practice been general?
A. Mostly surgery.
405 Q. On and prior to August of last year were you connected in any way with the Rock Island Railroad?
A. Yes, sir.
142 406 Q. In what capacity?
A. I was their surgeon here.
407 Q. At Omaha?
A. Yes, sir.

408 Q. How long had you been surgeon for that railroad here in Omaha?

A. During all the period that the road had been in Omaha, twenty years I imagine, I don't recall.

409 Q. Were you called out that night or some time that morning of the 12th of August last, on account of a wreck down at Richfield?

A. Yes, sir.

410 Q. Are you able to state when you were called?

A. Some time after midnight as I remember.

411 Q. And did you go out to Richfield?

A. Yes, sir.

412 Q. By what means?

A. In transportation furnished by the railroad.

413 Q. Did they send out a special train?

A. I don't know whether it was a special or a regular train, I have forgotten.

414 Q. Were you advised before you left Omaha that there had been a wreck of a circus train at Richfield?

A. Yes, sir.

415 Q. You went out there to render assistance to those that were injured?

A. Yes, sir.

416 Q. Among others did you find out there the plaintiff, Joseph Maucher?

A. Yes, sir.

143 417 Q. Do you recollect what Maucher's condition was while you were still out there at Richfield?

A. He was suffering great pain in the abdomen.

418 Q. Do you recall whether there were any visible exterior wounds upon him at that time?

A. No, I do not remember that.

419 Q. Was he brought to Omaha?

A. Yes, sir.

420 Q. Where was he taken to here in Omaha?

A. To the Clarkson Hospital.

421 Q. That is up here on Howard street?

A. Yes, sir.

422 Q. Did you attend him at the Clarkson Hospital?

A. Yes, sir.

423 Q. You may now tell the jury what your diagnosis of his condition disclosed when you got him to the hospital.

A. He was suffering from symptoms, which to my mind, indicated a probability that he had a rupture of some internal organ, intestine or liver or some one of those organs as a result of a contusion of the abdominal wall.

424 Q. What did you do after having made that diagnosis?

A. He was taken to the operating room and after the usual preparation his abdomen was opened and search was made for a rupture. No rupture was found, that is no tearing, but there was a large amount of serum tinged with blood coming from the abdominal

cavity. There was clotted blood in the veins of the omentum, which is the apron that hangs down and covers the intestines.

425 Q. Clotted blood in the vessels of that?

A. Yes, that is clotted blood right under that point. I don't know whether I said—I didn't state that he had on his abdominal
144 wall a sign of a bruise, or what we call a contusion. That was on the outside over the area through which the incision was made.

426 Q. How much of an incision did you have to make in the abdominal wall?

A. A good, liberal incision, six inches I should imagine, I don't remember exactly the length, a good, fair incision.

427 Q. You had to make it big enough so you could tell exactly what particular organ you had found?

A. He had a fairly fat abdominal wall, we had to make a good incision so as to see what we were doing.

428 Q. You of course put him under the influence of ether?

A. Yes, sir.

429 Q. Did you say at first there was some effusion of serum when you opened his abdomen, it would pour out?

A. It wasn't highly tinged with blood, but it had that color.

430 Q. Was there much of that?

A. Not a large quantity.

431 Q. What was the cause of that?

A. It was the contusion that did it.

Q. The bruise?

A. Yes, sir.

432 Q. From what had that come? Had it come from one organ or generally from the viscera?

A. Most of it came from the omentum, it came from the peritoneum, that is the lining of the abdominal cavity.

433 Q. You may state whether what you discovered after opening the abdomen disclosed to you that an abdominal operation was in fact necessary?

A. I don't know how to answer that question.

145 434 Q. What dangers would have been imminent from permitting the serum to remain spurting out there in the abdominal cavity, and the condition you found in the omentum?

A. I don't know, I must if I am allowed, qualify that.

435 Q. Yes, give your explanation of it.

A. The man had, when he was lying on the grass, down alongside of the track, all symptoms of having been injured in the abdomen. The pain was so great we had to give him morphine, and more morphine was given to control the pain. The symptoms were such as we usually find after contusion of the abdomen, we usually find those symptoms when we open the abdomen in injuries of the organs inside, it was for that reason we opened the abdomen.

436 Q. About how long a time was he under the influence of ether at the time of the operation?

A. I don't know, probably for an hour.

437 Q. How long did you continue to attend him, doctor?

A. Well, I haven't the record. He was there several weeks. I don't remember how many.

438 Q. At the hospital?

A. Yes, sir.

439 Q. Was he confined to the bed for a considerable portion of the time?

A. Yes, sir.

440 Q. And have you tended him or seen him since he left the hospital?

A. Yes, I have seen him.

441 Q. Now after he was under this operation of course the abdominal wall was sewed up?

A. Yes, sir.

146 442 Q. And did he have to remain in bed during a considerable part of the healing process of the abdominal wall?

A. Yes, sir.

443 Q. You may state whether or not the condition in which you found this man at Richfield was one indicative of much bodily pain?

A. Yes, sir.

444 Q. And state whether or not his condition during the time he was at the hospital was one of considerable physical pain?

A. Yes, sir.

445 Q. Have you examined him since he left the hospital?

A. Yes, sir.

446 Q. When was the last time?

A. I think he was in my office yesterday. I think it was yesterday.

447 Q. You looked him over again yesterday.

A. Yes, sir.

448 Q. Will you state to the jury what condition the physical examination of him at the present time discloses with respect to the condition of his abdomen?

A. He has—the upper part of the incision a little to the right shows considerable weakness of the abdominal wall. In other words the bruised tissues under the site of the incision, not bruises of the incision, but of the contusion of the wall, haven't repaired as they should in their parts. In other words the wall is weak there, the wound is weak.

449 Q. What is the effect of the weak condition of the wall upon his ability to perform heavy labor?

147 A. He will probably develope quite a rupture in the course of time, everything that goes with a rupture will interfere with his work.

450 Q. And will that be a permanent condition?

A. Yes, without it is repaired surgically.

451 Q. Have you had an opportunity personally to observe if he has been affected with nausea or vomiting since this injury?

A. I only know his story.

452 Q. Assuming—if we assume that since he has left the hospital he has been subject to fits of vomiting and that he didn't suffer from

anything of that kind before the injury, what would that indicate as to the condition of his abdomen at this time?

Mr. Herdman: That is objected to as incompetent, irrelevant, immaterial, not responsive to any issue in the case, too remote and speculative.

The Court: If you will connect the testimony with the plaintiff he may answer.

To which ruling of the court the defendant, by its counsel, excepted.

453 Q. (Continued:) Or the condition of the abdominal organs or abdominal walls.

Mr. Herdman: That is objected to as incompetent, irrelevant and immaterial, not responsive to any issue in the case, too remote and speculative.

The Court: The objection is overruled.

To which ruling of the court the defendant, by his counsel, excepted.

A. That there was something wrong.

148 Cross-examination by Mr. Herdman:

454 Q. This diagnosis you made of the plaintiff at the Clarkson Hospital wasn't borne out by what you learned or discovered by the operation, was it?

A. He had no rupture, but he had bruises and contusions of the organs inside.

455 Q. You operated because in your judgment the symptoms were such as to indicate a rupture of some internal organ?

A. Yes, sir.

456 Q. And when you operated you found no rupture?

A. No rupture, but a contusion.

Q. Well contusion is another name for a bruise, isn't it?

A. Yes, that is one name for it.

457 Q. Now, I wish you would state again, doctor, in your own language the condition you found after the incision.

A. After the abdomen was opened?

458 Q. Yes.

A. The first was a gush of a large quantity — peritoneal fluid from tension.

459 Q. You say there was a gush?

A. Yes, if it was a little hole it would have spurted, there was a tension of the abdomen.

460 Q. It didn't gush out at that place?

A. It came out freely, what I would call a gush, maybe you wouldn't.

461 Q. In other words it flowed out or gushed out just as any liquid would?

A. Under tension.

149 462 Q. Or pressure?

A. Or pressure, yes.

463 Q. Go on.

A. And this omentum of which I speak is an apron which hangs down from the stomach and covers the intestines. That is a regular apron. That had the appearance of bruised tissues, it wasn't torn, but a number of veins in this omentum were clogged up with clots of blood as a result of the bruise. I examined the intestines of course, and went over the man carefully, but I found no ruptured organs.

464 Q. And then you restored the intestines and sewed up the incision?

A. Yes, sir.

465 Q. And that was all you did in that operation?

A. At that time, yes, sir.

466 Q. Of course you afterwards washed the wound and dressed it?

A. Yes. I might go on and state something if you wish about more of the symptoms that followed.

Q. It is just as to this matter what you did at that time, subsequent to that you treated whatever condition developed?

A. Yes, sir.

467 Q. The fact is looking backward that the knowledge you had of his actual condition, that is the knowledge gained by this operation, the fact is no abdominal operation of that kind was required?

A. It was required.

468 Q. For what purpose?

A. The symptoms demanded it.

150 469 Q. I am not asking you about the symptoms, and I am not quarreling with your judgment as a surgeon. The question I put you was this, that had you before the operation the same knowledge you had after the operation would you have operated?

A. Do you mean if my foresight was as good as my hindsight?

470 Q. Yes, that is the question.

A. Why, I don't know whether I would or not. I think it was a good thing what I did for him, I know it was.

471 Q. I am not questioning that. Please answer my question.

A. I cannot answer it any other way.

472 Q. If you had prior to the operation the same knowledge of plaintiff's condition that you had after the operation would you have performed this operation upon the plaintiff?

A. The only way I can answer would be this, that if I had another case and I knew I would find just what I found in him I would open his abdomen and let the fluid out and sew him up.

473 Q. And make an incision there some six inches long?

A. I would make the proper incision. You cannot see to examine a man's belly through a litle pin hole opening.

474 Q. Answer the question?

A. Yes, I would make the same incision with the same kind of a belly.

475 Q. Although you knew all you would find there would be this serum?

A. I found more than that. I found a contused omentum. Of course the next wound might have a tear in it. I want to be fair in this matter.

476 Q. You ignore the conditions in my question. If you now had the same knowledge of the actual condition prior to the operation that you had of the condition following the operation
151 would you have made this operation upon the plaintiff?

A. I can not answer a question of that kind. I wouldn't do a useless operation knowingly. I wouldn't jeopardize a man's life.

477 Q. As a matter of fact the conditions you found upon the operation were different from what you anticipated you would find?

A. It wasn't as bad as I was fearful it would be.

478 Q. You anticipated you would find a rupture of some of the intestines?

A. Yes, from the symptoms.

479 Q. But you didn't find that condition?

A. Not the condition I feared.

480 Q. Do you know how long the plaintiff was confined to the hospital?

A. I don't remember, I hav-n't the record, he was there some weeks, I don't remember.

481 Q. Do you know how long the man was confined to his bed in the hospital?

A. I don't, recall, I have quite a number of cases. I can not remember such details without I have the record.

482 Q. Do you know and can you state from your present knowledge that he was confined to his bed as long as two weeks?

A. He must have been. I never let a patient up under two weeks.

483 Q. I asked you if you know?

A. I don't know, because I hav-n't the record, I can get the record.

484 Q. Do you know without referring to the records, can you say without referring to the records that he was at the hospital
152 as long as one month?

A. I think he was, I don't know.

485 Q. Do you say that he was under your care and treatment at that time?

A. No, sir, he was not under my care.

486 Q. How long since has it been that—since you treated him?

A. I hav-n't treated him, really treated him since he was discharged since he left the hospital.

487 Q. Now you say you examined him yesterday?

A. Yes, sir.

488 Q. Is that the time you observed this condition on the abdominal wall a little to the right of the incision?

A. A little to the right, it is part really of the incision, it is to the right of it, it does not appear to be but it is connected with it.

489 Q. By that you mean connected with the incision?

A. Of course it is just to the right, I think it is tissues that have

pulled back, I can show you his abdomen if you would like to look at it and explain what I mean.

490 Q. When did you first observe that condition?

A. I haven't examined him for a long time until yesterday.

491 Q. You observed that condition first yesterday?

A. Yes, I knew nothing about it.

492 Q. And what did you say in your judgment that condition was due to?

A. Due to the fact that the tissues were bruised at the time of the accident. When the incision was made as I almost invariably make them under the circumstances over the point of the injury, but it so happened in this case that repair didn't take place as I would hope to have it, the wall is weak.

153 493 Q. So that this condition then is due to the fact that the tissues at that point were bruised?

A. That is the way I explained it.

494 Q. You had to operate, this contusion being over the point of the bruise that place the principal tissues haven't thoroughly reunited?

A. They haven't united as well as I would like to see them.

495 Q. Did I understand you to say that the condition was a permanent one, that is permanent in the sense that it can not be repaired by proper surgical operation?

A. It can be repaired by surgical operation.

496 Q. Anything serious about it?

A. The operation?

497 Q. Yes.

A. It ought *not* to be in careful hands.

498 Q. Now did I understand you to say that at the present time from the condition as it is now that rupture would develope or had developed?

A. He has a weak wall, and I feel confident that in time he will have a rupture there. It looks like it and feels like it, that is my judgment.

499 Q. But that condition has not developed at this time?

A. You can see it yourself. There is quite a tendency to protusion. You can feel the weakened place, it is not extensive now, but it is apt to grow into a rupture.

500 Q. A rupture is visible, it is a protusion of the intestines through the walls of the abdomen?

A. Some of it. The most dangerous don't come through.

501 Q. Is it one of that kind that is visible to the eye of the layman and is in fact a protusion or extension through the wall of the abdomen?

A. It is not clear through. The wall is weak I would like
154 to show him to you and then you would have no further question about it.

502 Q. At the present time you are not in the employ of the Rock Island?

A. No, sir.

503 Q. And your relations with that company terminated about what time?

A. Well, I don't remember when I sent in my resignation.

504 Q. It was last fall some time?

A. Some time, yes, sir.

505 Q. Have you prescribed for the plaintiff since he left the hospital.

A. No, sir.

Redirect examination by Mr. Mahoney:

506 Q. Was it probably in September that you resigned your position with the Rock Island?

A. I don't remember the date. I have the letter of resignation and the letter of acceptance. I don't remember the dates. I didn't think much about it.

507 Q. You said that after this operation there were some symptoms while he was at the hospital you could tell us about. What were they?

A. He had of course the usual symptoms following ether, nausea and vomiting and he had some—now I am—I just perhaps had better not be too sure. I would rather consult the record. I have a flash in my mind that I remember something that happened which is quite positive, but I am not so absolutely sure of it. I would rather not say without the record.

508 Q. Is that what you had in mind that there were some symptoms after the operation?

155 A. Yes, that I am not so absolutely positive about that.

509 Q. Would you be able to consult those records and return this afternoon or tomorrow?

A. Yes, I can do that or telephone and get it from the — and determine whether I am right or not.

510 Q. That is for the purpose of satisfying your own recollection?

A. Yes, sir.

511 Q. Well we will pass that for the moment. You said that his present condition suggested the wisdom of another operation.

A. I didn't say it suggested the wisdom of another one.

512 Q. You said he might be cured with another?

A. Yes, sir.

513 Q. What kind would that be?

A. That would reuire opening the abdomen and dissecting the tissues and when through being sewed together again.

514 Q. What purpose would be accomplished by that?

A. To overcome the weakened abdominal wall.

515 Q. So as to get a stronger wall?

A. Yes, sir.

516 Q. Is the wall of this plaintiff's abdomen now in a condition wherein if you were to exhibit it to a person that was not a physician he would get a better understanding of it than he would by simply hearing you tell it?

A. Yes, sir.

517 Q. Then I will ask you, Doctor, to make that exposition of the abdominal wall to the jury.

Mr. Kelly: I would like to ask a question or two.

518 Q. The record shows it is about six months since this accident occurred. With that in view the wound is more discolored now than it will be as time passes on?

156 A. Do you mean the incision?

519 Q. Yes?

A. That generally tends to pale as it gets older, not always, but usually.

520 Q. Isn't it true than in an incision of six inches in a perfectly healthy person that six months afterward it *it* will show rather an offensive view, that is discoloration is shown where the stitches were?

A. No, the older it gets the better looking it gets. In six months it ought to look first rate.

521 Q. You wouldn't say that at the end of six months that that discoloration had passed away to the extent this passed away at that time?

A. That is not a bad looking wound particularly, if that is what you mean.

522 Q. Now, let me ask you this question. Outside of the particular operation on the abdomen is there any particular difference in an incision that appears in him now than if it was made at any other point of his body where there are no weakened conditions or bruises of that kind?

A. I don't understand the purport of your question.

523 Q. I ask you if there is any difference here now in the appearance of this incision and an incision that might have been made at any other point of his body that is not affected by a bruise at that time?

A. I don't think—the bruise as far as this incision is concerned in this particular individual, the incision has the same appearance from top to bottom of the bruise, showing his weakened condition is mostly at the top part of the incision.

524 Q. In what way is that discernible to the observation

157 of a casual person examining him?

A. I will show you.

525 Q. Can you answer the question?

A. When you put them together, when you compare one side with the other you find on one side that I am speaking of that the wall is weaker than on the other side of the incision.

526 Q. I say so far as it appears to the casual observer can it be observed?

A. I will show it to you.

527 Q. Describe it.

A. There is a tendency to bulge, it does not stick away out, it is not a complete rupture.

528 Q. And how large is that portion having a tendency to bulge?

Mr. Mahoney: I suggest that the Doctor can tell the dimensions a little better by having the abdomen exposed.

Mr. Kelly: It is cross-examination.

Question read.

A. Well, you can put two fingers, you can push two fingers, not three—what might be my two fingers and my little finger together, and you can push the anterior part of the abdomen wall. He is a pretty heavy man, you can push it together, you can feel each of the muscles so as to retract this back muscle that comes up on the other side of the abdomen, this rectus muscle, you can feel that retract for that distance.

529 Q. In an operation made for the purpose of correcting that to what extent would the incision be necessary?

158 A. To do that properly probably an incision of three or four inches. He is fat you know, and you have in order to get to that have room to see.

530 Q. In all ordinary probability would that lay him up?

A. Well, he would be in bed for several weeks. It might not unite. I don't know if he would stay in bed for three or four weeks and take good care of himself afterwards, and everything went all right he probably would be well.

531 Q. There is no doctor that can insure a case, but is there any condition known to you beyond the ordinary, why it would not unite?

A. I think it would unite.

Redirect examination by Mr. Mahoney:

532 Q. Now, Doctor will you examine the plaintiff and state what it discloses as you go along?

(The plaintiff here assumes a position on the platform by the reporter and upon request of counsel exposes his abdomen.)

The Witness: Dr. Summers, put your fingers here on this side, and then put them on that side and feel. And then come here (indicating). It is hard to explain to people that are not familiar what I mean by that.

The Doctor to the Plaintiff: Cough if you please.

(Witness coughs as directed.)

The Witness: When I had him lying down it was much more apparent of course. His abdomen is relaxed.

Mr. Kelly:

Q. Will you explain where the incision would be?

A. I would make it the same as this is made. You would have to dissect that and bring that one back to the other (indicating).

533 Q. Outside of that you call that a good wound?

A. Of course that is a good wound.

159 Mr. Mahoney:

534 Q. Dr. Summers, if it should be a fact that this plaintiff since this operation, injury and operation, and down to the present time has bloody passages from the bowels, and didn't formerly have anything of that kind before this injury what would that indicate?

Mr. Herdman: That is objected to as incompetent, irrelevant, immaterial, not within the issues of this case, and speculative.

The Court: The objection is overruled.

To which ruling of the court the defendant, by his counsel, excepted.

A. It would indicate that the bloody passages were the result of the injuries.

Mr. Mahoney:

534 Q. Now will you check up your recollection about these symptoms you had in mind and let us know whether you have a record of them or not?

A. I will make inquiry.

Mr. Herdman:

535 Q. Bloody stools or passages might be caused from a great many other things?

A. Yes, he may have piles.

Mr. Mahoney:

536 Q. Do you know whether he has piles or not?

A. No, sir.

Mr. Kelley:

537 Q. You don't know whether he has any other trouble or not?

A. All I know is his story to me.

Mr. Mahoney:

538 Q. Will you be able to satisfy yourself in regard to the symptoms you had in mind awhile ago by telephoning to the hospital?

A. Yes, I can tell whether my memory is all right on it or not.

160 JOSEPH MAUCHER, called and sworn on his own behalf as plaintiff, testified as follows:

Direct examination by Mr. Mahoney:

539 Q. State your name to the court and jury.

A. Joseph Maucher.

540 Q. Where do you reside, where is your home?

A. Brooklyn, New York, 123 Sampler Street.

541 Q. In Brooklyn, New York?

A. Yes, sir.

542 Q. Were you in the employ of what is known as Barnum & Bailey Circus a part of last August?

A. Yes, sir.
543 Q. Were you with that circus at Lincoln on the 11th of August?
A. Yes, sir.
544 Q. On the night of the 11th of August did you ship out of Lincoln with the circus?
A. Yes, sir.
545 Q. Are you able to tell us how many cars there were in that circus train?
A. No, sir, I could not.
546 Q. Among those cars were there some that were known as sleeping cars?
A. Yes, sir, two of them.
547 Q. And in traveling those sleeping cars were used by the employes of the circus company?
A. Yes, sir.
548 Q. In what part of the train were the circus cars placed, that is in the front or rear end of the train?
A. Those sleeping cars?
549 Q. Yes?
161 A. The rear end.
550 Q. Was there anything back of the sleeping cars?
A. Caboose.
551 Q. Anything else?
A. No, sir.
552 Q. In which of the sleeping cars were you riding that night?
A. The last car next to the caboose, number 57.
553 Q. On which side of the car was your berth?
A. On the right.
554 Q. That is right facing forward, were you facing toward either of the other, it would be the right?
A. Yes, sir.
555 Q. Had you gone to bed that night before the collision occurred?
A. Yes, sir.
556 Q. Were you in your berth at the time of the collision?
A. Yes, sir.
557 Q. Were you asleep?
A. Yes, sir.
558 Q. What was the first thing that you observed indicating that there had been a collision?
A. There was a crash, two small bumps and the turning over of the car.
559 Q. Which way did the car turn over?
A. To the right.
560 Q. So that as the car went over you were inside and went under?
A. Yes, sir.
162 561 Q. And in what predicament did you find yourself when the car had gone over on the side?

A. I was just wedged in, I could not move, everybody was yelling for help.

562 Q. What was there to prevent you from moving?

A. I could not naturally tell you what it was, but something that jabbed both sides of my abdomen that held me there.

563 Q. Were you able to get out at all yourself?

A. No, sir, they dragged me out.

564 Q. Have you any idea how long you remained in that position?

A. No, sir, I could not naturally state that.

565 Q. And what parts of your body were caught in this wreckage?

A. What part?

566 Q. Yes.

A. This right in through here (indicating).

567 Q. Across your abdomen?

A. Yes, sir.

568 Q. Do you know what it was that caught you across the abdomen?

A. I could not naturally say whether it was the timbers of the berth or what it was.

Mr. Kelley:

Q. You say you could not answer, do you know what it was?

A. Know what wedged me in, no, sir.

Mr. Mahoney:

Q. Was it part of the car?

A. Yes, sir.

569 Q. Do you know who it was that got you out?

A. Yes, sir.

570 Q. Who was it that got you out?

A. Mr. Henry, the steward, Mr. Charles Henry.

163 571 Q. Was he also one of the employes of the circus?

A. Yes, sir, steward of the Barnum & Bailey Shows.

572 Q. After you were extricated from the berth where were you taken?

A. I don't remember where I was taken at all after I got out into the air. I don't remember a thing after that.

573 Q. You lost consciousness?

A. Yes, sir.

574 Q. And did you recover consciousness at all while you were out there at Richfield?

A. Yes, sir.

575 Q. And when you did recover consciousness what is your recollection of where you were?

A. That I was lying on some sheets and the doctor was standing over me.

576 Q. Dr. Summers?

A. Dr. Summers, yes, sir.

577 Q. So you had been unconsciousness from the time you were pulled out of the wreck until after he got down there?

A. Yes, sir.

578 Q. Now you may describe to the jury as well as you can how you felt at that time, what sensation of pain you had and where it was?

A. Well as far as I can state them is that it seemed that something was troubling me inside, and the pain was so severe.

Mr. Herdman: That is objected to as not responsive.

The Court: The objection is overruled.

To which ruling of the court the defendant, by its counsel, excepted.

164 A. It seemed that something on the inside was troubling me and I could not naturally catch my breath any more, and when the doctor came they bandaged me up across the abdomen, he said two or three words, I don't remember what he did say to me. I believe he said "We ɛill take care of you," and then I lapsed into unconsciousness again.

579 Q. You lapsed into unconsciousness again?

A. Yes, sir.

580 Q. You may state whether during that interval of consciousness you had much pain in your abdomen?

A. Yes. They told me to keep quiet. I was groaning so, and everything would be all right.

581 Q. Then after lapsing into un-sciousness again when and where did you next recover consciousness?

A. In the baggage car.

582 Q. Was the train moving at that time?

A. Yes, sir.

583 Q. And were there others in the baggage car?

A. I didn't see.

584 Q. You didn't?

A. No, sir.

585 Q. Do you know who, if anyone, was with you in the baggage car?

A. Yes, sir, the doctor came in there and gave me an injection.

586 Q. That is a hypodermic injection?

A. Yes, an injection.

587 Q. After regaining consciousness at that time did you remain conscious all the way to Omaha?

A. No, sir, I was unconscious until I reached the hospital again.

165 588 Q. Now have you any idea how long you were conscious in the baggage car?

A. About five minutes I believe.

589 Q. And during that interval what was your condition as to pain?

A. Same as before, just naturally in pain all the time and the doctor had to quiet me.

590 Q. Then when you again lapsed into unconsciousness where did you wake up at that time?
A. That was just before they put me under ether.
591 Q. In the hospital?
A. Yes, sir.
592 Q. Do you know whether it was daylight?
A. Yes, sir, it was.
593 Q. Were you told where you were?
A. No, sir, not until the doctor told me.
594 Q. Did he tell you before or after he put you under the influence of ether?
A. Before.
595 Q. You then learned you were in the hospital?
A. Yes, sir.
596 Q. And the next thing that was done to you was what?
A. Put me under either.
597 Q. Of course you became unconscious from the ether?
A. Yes, sir.
598 Q. Then where were you when you next recovered consciousness?
A. I was in the hospital in a private room with two beds.
599 Q. In bed?
A. Yes, sir.
600 Q. That was after Dr. Summers had operated on you?
166 A. Yes, sir.
601 Q. How long did you remain in bed there at the hospital?
A. That is confined to the bed steadily?
602 Q. Yes, to the bed steadily.
A. Almost four weeks.
603 Q. And what was your condition as to suffering pain during that time?
A. The pains were so bad a special nurse had to watch me.

Mr. Kelley: I move that be stricken out as not responsive.
The Court: The motion is sustained.

To which ruling of the court the plaintiff, by his counsel, excepted.

604 —. Mr. Mahoney: What was your condition in regard to suffering pain during those four weeks, did you suffer much pain?
A. Yes, sir.
605 Q. And where was the pain?
A. In the abdomen.
606 Q. Did you have a nurse?
A. Yes, sir.
607 Q. One or more than one?
A. Three.
608 Q. Three nurses during the same twenty-four hours?
A. No, sir, two during the day time and one at night.

609 Q. Now during that period of time and after your operation did you have any more hypodermic injections?

A. Yes, sir.

610 Q. How frequently did they give you these hypodermic injections after the operation?

167 A. Three or four at a time, that is during the time, that is during the night and day, I had them more so at night than I had at day.

611 Q. Do you know why that was?

A. Yes, from the pains and the spells, I had vomiting spells. There was nothing left through my passages at all, it came through my mouth.

Mr. Kelley: I move to strike out the answer as not responsive.

The Court: It is a little broader than the question.

Mr. Mahoney: I can reform the question. When you spoke of three or four hypodermic injections at a time did you mean at the same instant or that many during twenty-four hours?

A. During the twenty-four hours.

612 Q. And what is the fact as to whether the greater part of those were given to you at night or in the day time?

A. Because I suffered more pain at night than I had at day time. I had a lot more all the time, I could not naturally turn from one side to the other.

Mr. Kelley: I move to strike out the answer.

Mr. Mahoney:

Q. I ask you what the fact is. Did they give you more of those hypodermic injections in the day time than the night time?

A. At the night time.

613 Q. Now you state the condition of pain that you had necessitated a greater number of hypodermic injections at night?

A. Pain—that was over the abdomen.

614 Q. Did you have more pain at night than at the day time?

A. Yes, sir.

615 Q. How did you have to lie?

168 A. Had to lie on my back all the time.

616 Q. Were those pains very severe?

A. Yes, sir.

Mr. Kelley: We object to this line of examination, being leading, and move the answer be stricken out as calling for the conclusion of the witness and leading.

The Court: It is leading, but it is within the discretion of the court to allow them. Avoid leading questions. The objection is overruled.

To which ruling of the court the defendant, by its counsel, excepted.

Mr. Mahoney:

Q. What was your condition with regard to getting asleep during that period?

A. I could not get no sleep whatsoever.

617 Q. Mr. Maucher, during that time how did your stomach act?

A. Well, I could not eat nothing.

Mr. Kelley:

Q. What time do you refer to now?

Mr. Mahoney: I have been interrogating the witness thus far during the four weeks he was confined to the bed.

A. There was seven days I had nothing but hot water to drink, that was my food.

618 Q. And after the seven days what did you take into the stomach?

A. I could not take nothing, when I did take it I would always have these vomiting spells, several times they had to use the stomach pump on me.

169 The Court: I will ask you to pay pretty direct attention to the questions and confine your answers to his questions, and not volunteer any other matter, but answer his questions. Your attorney will put all the questions that are necessary.

Mr. Mahoney:

619 Q. During the first seven days after the operation, when you were allowed to take nothing but hot water, state what the fact is as to whether the stomach would retain the hot water?

A. Yes, for a certain length of time.

620 Q. And then what would occur?

A. It would cause the vomiting spells.

621 Q. And did you have much pain just at those vomiting spells?

A. Yes, sir.

622 Q. And where was the pain?

A. In the abdomen.

623 Q. And can you tell us how *am*ny times in the twenty-four hours you would have those vomiting spells, say, during the first seven days?

A. Well, they used to come three inside of an hour at a time.

624 Q. Then there would be some hours you wouldn't have any?

A. Yes, sir.

625 Q. Now after the first seven days what did they next give you?

A. Hot lem*p*nade.

626 Q. And can you tell us about how many times a day they gave you that?

A. Three and four times.

627 Q. And for how long a period did they give you those hot lemonades?

A. Ever since I have been in bed.

170 628 Q. The first seven days I understood you was that when they gave you hot water?

A. Yes, sir.

629 Q. And then they commenced on the hot lemonade?

A. Yes, sir.
630 Q. How long did they continue the hot lemonade?
A. While I stayed in bed.
631 Q. That would be the remainder of the four weeks?
A. Yes, sir.
632 Q. Will you tell the jury how your stomach acted with the hot lemonade?
A. Well, it acted a little more—better than it did with the hot water, at the same time it caused the vomiting spells.
633 Q. And what is the fact as to whether you had pain in the stomach or abdominal region in connection with these vomiting spells while you were taking hot lemonade?
A. I could always feel the pain coming on before I had the vomiting spell.
634 Q. Before they let you out of bed, before the end of the four weeks did they give you any other nourishment?
A. Yes, they gave me boiled eggs.
635 Q. Boiled eggs?
A. Yes, sir.
636 Q. About how long after you got into the hospital before they gave you the first boiled eggs?
A. I should judge it was about the second week.
637 Q. And how many times a day did they give you the egg?
A. Twice.
Q. And how did your stomach act after taking the eggs?
A. At the time it acted all right, but about an hour or so afterward it would bring forth vomiting spells again.

Witness excused for the present.

171 T. J. DWYER, called and examined on behalf of the plaintiff, testified as follows:

Direct examination,

By Mr. Mahoney:

638 Q. Your name is T. J. Dwyer?
A. Yes, sir.
639 Q. Your calling?
A. Physician and Surgeon.
640 Q. How long have you practiced that calling?
A. Eleven years.
641 Q. Of what medical college are you a graduate?
A. Creighton Medical College, Omaha, Nebraska.
642 Q. Have you been practicing your profession during the entire eleven years in this community?
A. Yes, sir.
643 Q. State whether or not during that time you have devoted yourself to surgery?
A. Almost constantly, yes, have been at it constantly.
644 Q. Do you know the plaintiff in this case, Joseph Maucher?
A. Yes, sir.

645 Q. When did you first meet him?

A. A Week ago last Saturday, I don't know just what date that was, in the afternoon. I examined him with Dr. Lord at Dr. Lord's office here in Omaha.

646 Q. I wish you would now state, Doctor, the condition in which you found the patient at that examination, a week ago last Saturday.

A. From that examination I found a very extensive scar in the abdominal wall, extending several inches in length, which had been made there a few months previously for the purpose of exploring and doing some operative work in the internal organs.

172 647 Q. That scar was the result of the operation of a surgeon?

A. Yes, sir.

648 Q. You may go on and describe what else you found in that examination.

A. The scar was rather an extensive on-, and had all the appearance of what we call drainage. It was of such a nature that drainage had been used in the operation, that is pieces of gauze had been left sticking to the skin in order to drain away any material that might accumulate in the abdominal cavity following the operation. And on account of the extensiveness of the scar the muscles were very much weakened and bulged at that point.

649 Q. State whether you found following the operation in the abdomen a condition which attracted your attention.

A. The outer end of the scar bulged considerably when the patient would be in an upright position and caved here (indicating). That would bring an extra force upon that point (indicating).

650 Q. And to what extent did you find the abdominal wall impaired near those sections?

A. Well, that particular point was weakened almost to the point of what we call rupture or hernia. We would call it a hernia or breech in the muscular tissue of the wall of the abdomen.

651 Q. Would it be practical for a man with an abdominal wall in that condition to do any heavy work?

A. It would be attended with considerable inconvenience.

652 Q. And what would be the reasonable probability of a complete rupture occurring there?

173 A. In that case it is almost certain to be a complete rupture, that is a separation of the muscular tissues, the stronger tissues.

653 Q. Assuming that the plaintiff received an injury in the nature of bruising or pressing about the walls of the abdomen, say approximately six months before you made that examination, disclosing symptoms of that indicated rupture of some of the internal organs of the abdomen, and that upon the abdomen being opened by the surgeon, there gushed forth a considerable quantity of serum tinged with blood, which had flown into the abdominal cavity following the injury, that none of the intestines or other abdominal organs were actually ruptured, but that in the apron or omentum there were found blood vessels that were clogged with clots of blood, that an operation which would be usual for these conditions was

performed and drainage was taken care of in the manner that the surgical wound here indicates, and the man was kept in bed for a period of four weeks, and then in the hospital some time thereafter, that while in the hospital the passages from his bowels were bloody, that there was much distress in the abdominal region and frequent vomiting, that since his discharge from the hospital and down to the present time, he suffers severe pain in the abdominal region and from vomiting, and that he has this condition of the abdominal wall that you found; assuming that prior to the injury that he hadn't suffered from any such distress, hadn't such weakness of the abdominal wall, hadn't passed any bloody passages from his bowels, that he still had discharges of bloody passages from his bowels, and still has nausea and fits of vomiting, what would those conditions indicate as to his present condition, and the prospects for his future?

174 Mr. Herdman: That is objected to as incompetent, irrelevant and immaterial, and for the further reason that the question does not reflect the testimony and recites facts and conditions and symptoms not disclosed by the testimony.

The Court: The objection is overruled.

To which ruling of the court the defendant, by its counsel, excepted.

A. It would indicate adhesion of the parts, that is adhesion or growing together of the intestines, or internal organs to each other or to the abdominal wall. The vomiting, distress and pain particul-rly would indicate that.

Mr. Mahoney:

654 Q. That is it would indicate that as to the present condition?

A. Present condition, yes.

655 Q. In respect to that abdominal wall and that condition generally, what would be your prognosis, what is the future for him?

A. He is almost absolutely sure to have a condition of hernia or rupture, or some separation which increases as time goes on, or specially the condition of labor, it would depend a great deal upon his labor. If he is a laboring man and has that kind of work to perform, or work that will bring a strain or tension of those muscles the chances of having considerable vomiting and pain on account of the adhesions, in my opinion will continue unless surgical interference takes place.

175 Cross-examination,

By Mr. Herdman:

656 Q. You say that the plaintiff is almost sure to have a more complete rupture or a complete rupture?

A. Yes, sir.

657 Q. By that do you mean the rupture would be at the point where the abdominal wall is weakened?

A. Yes, sir.

658 Q. Now that condition, Doctor, is that past remedy?
A. Do you mean that nothing can be done for it?
659 Q. Yes?
A. No, sir, that can be operated on with reasonably good success.
660 Q. Is that what you call a serious operation?
A. It is a major operation.
661 Q. It is a major operation in the sense that it is an incision or cut, is it serious in the sense of endangering the life?
A. The seriousness of it will depend largely upon the adhesions. It is not serious unless apron or omentum——
662 Q. I am talking about the apron.
A. It is not as a rule serious.
663 Q. Well, then the condition you speak of is one that can be removed by an operation, which is not a serious operation in the sense of endangering the plaintiff's life?
A. Yes, sir.
664 Q. Now you say these symptoms or conditions of nausea, vomiting and bloody passages, etc., indicate adhesion of the intestines to the wall of the abdomen?
A. Yes, sir.
665 Q. And those things might have other causes, might they not?
A. Yes, sir.
666 Q. You know nothing about the plaintiff's history other than what he told you?
176 A. No, sir.
667 Q. The first time you saw him was on this Saturday, a week ago when you made the examination?
A. I examined him with Dr. Lord in his office.
668 Q. And that examination was simply of the body as it appeared externally?
A. Yes, sir.
669 Q. And your opinions are based on that as to the subjective condition as disclosed by Maucher himself and what he told you?
A. Yes, sir.
670 Q. You have no knowledge that he has nausea, vomiting or bloody passages other than what he told you?
A. No, sir.
671 Q. You never, of course, prescribed for Maucher?
A. No, sir.

Redirect examination by Mr. Mahoney:

672 Q. Is there any certainty that an operation for the purpose of correcting the condition of the abdominal wall would completely correct it?
A. Our experience is that the operation is very successful unless there is too much destruction of the abdominal tissues.
673 Q. By "very successful" you mean an improvement in the conditions?
A. Yes, sir.

674 Q. Does there remain, notwithstanding, a danger of a rupture recurring there in the event of heavy labor?

Mr. Kelley: That is objected to as not proper redirect examination, calling for a conclusion, not an expert opinion and argumentative.

177 The Court: The objection is sustained.

To which ruling of the court the plaintiff, by his counsel, excepted.

Mr. Mahoney:

675 Q. In respect to the possibility of other causes for the nausea-pain and bloody passages, if it be a fact, Doctor, that the plaintiff had not suffered from any of those symptoms and conditions prior to his injury, that he has suffered from them ever since the injury, then what would be your judgment as a surgeon as to what was the cause of those conditions in this case?

Mr. Herdman: That is objected to as incompetent, irrelevant, immaterial, and for the further reason it is within the province of the jury and not calling for an answer as to matters testified to.

Mr. Kelley: And for the further objection, the matter has been gone into on direct examination.

The Court: The objection is overruled.

To which ruling of the court the defendant, by its counsel, excepted.

A. Due to the injury and to the operation subsequent or incident to it.

Mr. Herdman:

676 Q. In other words, you would ascribe part of the plaintiff's present condition to this operation, would you?

A. No, sir, to the condition for which the operation was performed and the things that have to be done to the tissues of the abdominal wall; in the operation, the abdomen has got to be opened up and the tissues have got to be laid wide and sutured together, and all those things have a tendency to create forms of adhesion.

178 677 Q. Now let me see if I understand you, Doctor. Did you say that the surgical operation, that is the opening of these adhesions has a tendency necessarily and as a consequence of the operation itself, has a tendency to cause these adhesions?

A. Yes, sir.

678 Q. So that these adhesions you speak of may in part be due to the operation?

A. Yes, sir.

679 Q. Rather than to these injuries you speak of?

A. Yes, sir.

Mr. Mahoney:

Q. That is then, they result from both?

A. Yes, sir.

JOSEPH MAUCHER resumed the witness stand on his own behalf, testified as follows:

Direct examination continued by Mr. Mahoney:

680 Q. During the time that you were in the hospital after this injury what is the fact as to whether you had bloody passages from the bowels?

A. I did, sir.

681 Q. Had you ever had anything like that before?

A. No, sir.

682 Q. Had you ever had anything like piles?

A. No, sir, not as I know of.

683 Q. During the time that you were in the hospital did the distress and vomiting continue clear down until you left there?

179 A. Yes, sir.

684 Q. Now take up your history in the hospital where we left off. The last food you mentioned was two boiled eggs a day?

A. Yes, sir.

685 Q. And you say you retained them for a time on your stomach and then about how long after you took them did you have vomiting spells?

A. About fifteen or twenty minutes afterwards.

686 Q. And were those vomiting spells violent?

A. Yes, sir.

687 Q. Was there much distress and pain?

A. Yes, sir.

688 Q. And what was the next food and nourishment that they tried to give you there?

A. Toast and tea?

689 Q. How long had you been in the hospital when they gave you some toast and tea?

A. About three weeks, three weeks or something like that, I don't just exactly remember.

690 Q. You were still in bed?

A. Yes, still in bed.

Q. And how did your stomach act when you took toast and tea?

A. It acted the same as it did before.

691 Q. That is, at first it was all right for ten or fifteen minutes and afterwards you had those spells?

A. Yes, sir.

692 Q. How long did you remain in the hospital after they let you out of bed?

A. Well, I should judge about two weeks afterwards.

693 Q. Making about six weeks all told?

A. Yes, sir.

180 694 Q. Do you remember the date on which you left the hospital?

A. No, sir, I do not.

695 Q. Did they try any other nourishment that you haven't mentioned before you left the hospital?

A. No, sir.

696 Q. Now was there any day up to the time you left the hospital that you didn't have the distress from pain and vomiting you have spoken of?

A. No, sir.

697 Q. Since you have been out of hospital and down to the present time what is the fact as to whether you have had such pain and distress and vomiting?

A. I have them almost continuously, that is if I eat anything of a fatty substance, or anything that is fried in fat, it does not agree with me.

698 Q. So how often do you have those vomiting spells now?

A. Sometimes once, sometimes twice a day.

699 Q. Down to the present time?

A. Yes, sir.

700 Q. What is the fact as to whether you have pain in connection with them or before the vomiting?

A. Before the vomiting.

701 Q. If you have pain?

A. Yes, sir.

702 Q. Now about the passages from your bowels down to the present time?

A. I have them on an average of two or three times a week.

703 Q. That is the passage or do you mean bloody passage?

A. Bloody passage.

704 Q. Bloody passage?

A. Yes, sir.

181 705 Q. What was your age at the time you received this injury?

A. Thirty-two.

706 Q. Had you had any of those conditions of distress about the abdomen or pain about the abdomen or vomiting or bloody passages from your bowels at all before you had this injury?

Mr. Kelley: That is objected to as leading and suggestive to the witness.

The Court: The objection is overruled.

To which ruling of the court the defendant, by its counsel, excepted.

A. No, sir.

Mr. Mahoney:

Q. Have you a trade?

A. Yes, sir.

707 Q. What is it?

A. Cook.

708 Q. How long have you followed that trade?

A. Twelve years.

709 Q. And where have you followed it?

A. Well, part of the time in Cincinnati, part of the time in Brooklyn, New York, and part of the time with Barnum & Bailey's circus.

710 Q. How long did you follow that employment in Cincinnati?

A. Well, I should judge about six years.

711 Q. How long in Brooklyn?

A. Two years.

712 Q. How long did you follow that employment with Barnum & Bailey's circus?

182 A. In 1904 was the first year I went with Barnum & Bailey's circus. I can not state exactly how long it might have been, I guess I was with them four years I guess, that is not the whole year through.

713 Q. That is the circus season?

A. Yes, there was twice I didn't work the season through.

714 Q. But you have been with them at least parts of four seasons?

A. Yes, sir.

715 Q. Traveling with them and cooking for them?

A. Yes, sir.

716 Q. Are you able to state to the jury about what wages you have been able to average through the year for the twelve years you have been following the occupation of a cook?

A. At the average of a hundred dollars a month.

717 Q. Sometimes more, sometimes less?

A. Yes, I used to get a hundred and twenty, that is an average of a hundred.

718 Q. Have you tried to do any work since you got out of the hospital?

A. Yes, sir.

719 Q. And what was the result of it?

A. I had to quit on account of sickness.

720 Q. What sickness?

A. Over the abdomen.

721 Q. The same?

A. Yes, violent headaches and vomiting spells.

722 Q. Had you ever had headaches before that time?

A. No, sir.

723 Q. How has this injury in its conditions affected your ability to get a night's sleep?

183 A. Well, I can lie in bed for an hour, that is sleep in bed for an hour and then wake up, and then I won't go to sleep for another three or four hours, and sleep for an hour and lay awake the rest of the night.

724 Q. Does that condition continue right along?

A. Yes, sir.

725 Q. Did you ever have any condition like that before?

A. No, sir.

726 Q. Never did?

A. No, sir.

727 Q. Mr. Maucher, you have spoken of the pain that you have

preceding the vomiting. I will ask you when you are compelled to vomit down to the present, whether you get any pain in the place where the abdomen was cut open, or about there, in connection with the vomiting?

A. Yes, sir, I do.

728 Q. In case you have to cough what effect does that have upon your abdomen?

A. Well, it just seems like a needle or something like inside.

729 Q. Is that true in case you have to vomit?

A. It is most serious then.

730 Q. More serious when you vomit?

A. Yes, sir.

731 Q. State whether the vomiting always causes you pain in the walls of the abdomen.

A. It does.

Cross-examination by Mr. Kelley:

732 Q. You are thirty-two years of age?

A. Yes, sir.

733 Q. How long since you finished school?

A. Eighteen, when I was eighteen years of age.

734 Q. How long have you been working at your trade as cook?

184 A. How long?

735 Q. Yes?

A. Since I was twenty-one I believe, twenty-one or twenty-two, I am not sure now.

736 Q. Then you have been working ten or eleven years?

A. Yes, I said around twelve.

737 Q. What wages did you start in with?

A. Fifteen dollars a week.

738 Q. You don't mean you have averaged a hundred dollars a month during all the time you have been working as a cook?

A. Average one hundred dollars?

739 Q. During all the time?

A. Oh, yes, sir.

740 Q. For the last eleven years?

A. Yes, sir.

741 Q. What did you get the first year?

A. I never figured that up.

742 Q. You didn't take that into calculation?

A. No, sir.

743 Q. What did you get the second year?

A. What did I get the second year?

744 Q. Yes?

A. I got about a hundred and twenty dollars I believe it was.

745 Q. Where did you work?

A. In New York City and Brooklyn, New York.

746 Q. For whom did you work?

A. My cousin, Mr. Sanders.

747 Q. Did you work the whole year through?
A. Yes, two years for him.
748 Q. What year was that?
A. That was when I was twenty-two or twenty-three.
749 Q. Then where did you go?
185 A. That is the year I joined Barnum & Bailey's circus.
750 Q. That was when?
A. 1904.
751 Q. What wages did you get from Barnum & Bailey?
A. Forty dollars per month.
752 Q. How long did you work for them that year?
A. I worked that year until I got to San Francisco, I could not naturally tell you how long it was, it was shortly after, I don't know whether it was the 9th or 10th, on Labor Day.
753 Q. Late in the fall?
A. Yes, sir.
754 Q. Then where did you next resume your work as cook?
A. In Cincinnati.
755 Q. How long after?
A. Shortly afterwards, about two weeks after.
756 Q. How long did you continue that?
A. I stayed there, I don't know whether the next year I went out with Barnum & Bailey, but I believe it was 1906, I stayed there until that length of time, because I met them in Cincinnati.
757 Q. You have been four seasons, more or less, with the Barnum & Bailey Show?
A. Yes, off and on.
758 Q. What wages did you get the second year?
A. The same amount, forty dollars.
759 Q. What were you getting last season?
A. I was getting twenty-five and fifteen dollars hold back.
760 Q. That would make a total of forty, including everything?
A. Yes, sir.
186 761 Q. So you got then a hundred dollars a month or more except the job with the circus for forty dollars a month?
A. Yes, sir.
762 Q. And that is what you were working at when you were hurt?
A. Yes, sir.
763 Q. As a cook in Brooklyn for instance, or Cincinnati about how many hours a day did you work?
A. Twelve.
764 Q. About how many hours a day did you put in with the circus?
A. I never really did figure it up.
765 Q. About when did you get up?
A. Some mornings I got up at four o'clock, some mornings at five, some mornings I didn't get up until eight.
766 Q. On an average when did you get up in the morning?
A. About four o'clock in the morning.

767 Q. If it was later than that it was because the trains hadn't got to town?

A. Yes, sir.

768 Q. So if the train was in town you were out of bed on or before four o'clock?

A. Yes, sir.

769 Q. Your continuous service during the day with Barnum & Bailey Circus ended when?

A. Half past five or a quarter of six in the evening, sometimes six o'clock.

770 Q. Then when did you leave town on the average?

A. About ten o'clock at night.

771 Q. Did you say you left on an average of ten?

187 A. Yes, that is when the train pulled out.

772 Q. How?

A. When the train pulled out because after six o'clock my day's work was done.

773 Q. About when did you get to your berth—or about when did you get in the train so you were ready and able to take it?

A. Eight o'clock, sometimes half past, just depends on the size of the towns.

774 Q. You weren't the only cook with the Barnum & Bailey Shows?

A. No, sir, I guess there were several others.

775 Q. Going back to your confinement in the hospital, you stated to the jury that you had three nurses a part of the time?

A. Yes, sir.

776 Q. They weren't special nurses were they?

A. No, sir, nurses that always waited on me.

777 Q. You didn't have any nurse that specially attended you, exclusively attending you?

A. No, sir, not exclusively.

778 Q. Those other nurses that were attending you were on duty in the hospital at that time?

A. No, not at that time.

779 Q. Attending there?

A. No, sir, not when I was seriously ill.

780 Q. I just want to get your attendants. You say they were special nurses engaged exclusively in attending you in that hospital?

A. I said no.

781 Q. I asked you if they were not on duty in attendance

188 on other patients at that time?

A. When I was seriously ill they were there all the time, one in the morning, one in the afternoon and one at night.

782 Q. They were rendering services to other patients in the hospital?

A. Not as I know of.

783 Q. But you don't know, do you?

A. No, sir.

784 Q. You don't pretend to say that they were not, do you?

A. They were part of the time, that is all.

785 Q. Just answer the question. You don't pretend to say they were not?

A. I could not be sick in bed if I could get up.

786 Q. Do you pretend that they were not in the hospital around there serving other patients in the hospital at that time, or don't you?

A. No, I can not.

787. Q. You said, did you not, that for seven days you took nothing but hot water?

A. Yes, sir.

788 Q. You said they had to use the stomach pump on you?

A. Yes, sir.

789 Q. How often?

A. They only used it but once. I pulled the stomach pump from me that placed it on me.

790 Q. Answer the question.

A. Two or three times.

791 Q. They used the stomach pump that many times?

189 A. Yes, I believe it was three.

792 Q. You said you vomited during all the time you remained in the hospital?

A. Yes, sir.

793 Q. Now were your intervals of vomiting about the same from the time you went in until you came out?

A. Were they what? I don't understand the question.

794 Q. Were the vomitings on an average about as frequent as another?

A. No, sir, not on the average.

795 Q. You vomited less when you went out of the hospital?

A. Yes, sir.

796 Q. Let us take the first seven days when you were on the water diet.

A. Yes, sir.

797 Q. Did you vomit every day about the same?

A. No, sir, some days more than others.

798 Q. Some days not at all?

A. Oh, yes.

799 Q. Did you vomit some days more than others?

A. Yes, sir.

800 Q. Some days not at all?

A. All the time, there was no day at all during those seven days I didn't vomit at all.

801 Q. How about your coming out from the influence of the an-esthitic, you vomited more for a day or two than you did at any time since then?

A. No, sir.

802 Q. You said you were in the hospital about two weeks after you left your bed?

A. Yes, sir.

190 803 Q. Did you receive any treatment during those two weeks?

A. Yes, sir.
804 Q. I don't mean the question of food and sleep and bed, I mean were you receiving any medicine?
A. Yes, sir.
805 Q. From whom?
A. From the nurse.
806 Q. What nurse?
A. I could not tell you.
807 Q. Was it medicine that you drank?
A. Yes, sir.
808 Q. Taken internally?
A. Yes, sir.
809 Q. You don't know whether it was to regulate your bowels, or otherwise?
A. No, sir, I don't know nothing about it.
810 Q. What is your regular diet now?
A. Milk and eggs, that is hot milk and eggs.
811 Q. You said you had considerable pain in your stomach when you had anything fried in fat?
A. Yes, sir.
812 Q. Something fried in fat will knock out almost any stomach.
A. Never did before.
813 Q. Never did yours before?
A. No, sir.
814 Q. Do you mean to say you are not eating a full meal now?
A. Yes, sir.
815 Q. Where are you boarding now?
A. On 20th street.
816 Q. What place?
191 A. Mrs. Jacobson, is the name, I don't know the number of the house.
817 Q. Near the corner of what street?
A. A short distance from Clarkson Hospital.
818 Q. Near the corner of what street?
A. Howard street.
819 Q. How long have you been boarding there?
A. Since last Monday.
820 Q. Where did you board next preceding that?
A. 2519 St. Mary's Avenue.
821 Q. How long did you board there?
A. Ever since I left the hospital.
822 Q. You said you did some work since your injury.
A. Yes, sir.
823 Q. What kind of work?
A. Shipping Clerk.
824 Q. Where?
A. Hayden Brothers.
825 Q. In what business are they?
A. General Department store.
826 Q. What was the nature of your services there?

A. Shipping clerk.
827 Q. What was the nature of your duties?
A. The same as any man doing those things.
828 Q. What were your hours there?
A. From seven to six.
829 Q. You didn't have any manual labor?
A. Yes, sir.
830 Q. How long did you work there, during what period of time?
A. I don't know whether it was six or seven weeks, I am not sure.
192 831 Q. Do you know when you began?
A. No, sir, I do not.
832 Q. When did you quit?
A. Oh, about four weeks ago, four or five weeks ago.
833 Q. What doctors have you been to since you left the hospital?
A. The only doctor I visited was Dr. Leaver.
834 Q. How do you spell his name?
A. I believe it is L-e-a-v-e-r,
835 Q. He is an Omaha doctor?
A. Yes, sir.
836 Q. How often did you visit him?
A. Only once, that was during the last serious illness I had.
837 Q. When was that?
A. Well that was about the time I left Haydens.
838 Q. That was about your weeks ago?
A. Yes, about that.
839 Q. Did he prescribe for you?
A. Yes, sir.
840 Q. More than once?
A. The once, yes, sir.
841 Q. Not more than once?
A. Once, yes, sir.
842 Q. You have been sort of an active man most of your life, haven't you?
A. Yes, sir.
843 Q. You say you have trouble with your sleep now?
A. No, sir.
844 Q. Not doing anything now?
193 A. No, sir.
845 Q. Lying around?
A. Yes, sir.
846 Q. With your lawsuit on your hands.
A. No, sir.
847 Q. You naturally would have trouble with your sleep?
A. No, sir, I think I ought to get more sleep now than ever.
848 Q. You don't feel weak, do you?
A. Yes, I do feel weak.
849 Q. You are out a good deal every day, aren't you?
A. Yes, I go out off and on.
850 Q. Walk all around town?
A. Yes, sir.

851 Q. Going back to the circus; you shared a berth exclusively or with some one else?
A. With some one else.
852 Q. And the car was made up with a number of berths for employes?
A. Yes, sir.
853 Q. There was nobody in that car who was not an employe of the circus?
A. No, sir, not that I know of.
854 Q. Where did you get your car, that is the railroad cars, at the passenger station?
A. Sometimes at the passenger station, sometimes at the railroad yard.
855 Q. Wherever it happened to be?
A. Yes, sir.
Q. Who furnished your transportation?
A. Barnum & Bailey.
856 Q. That was included in your contract, wasn't it?
A. Yes, sir.
194 857 Q. While you were at the hospital what doctors attended you?
A. Dr. Summers and Dr. Bordhoff.
858 Q. Do you know how he spells that?
A. B-o-r-d-h-o-f-f. And there was another doctor, I don't remember his name.
859 Q. Was he an interne at the hospital?
A. Yes, sir.
860 Q. Doctor Summers was the only doctor outside the hospital?
A. Yes, sir.

Mr. Herdman:

Q. This sleeping car you spoke of wasn't what was known as a Pullman car?
A. We always took it to be a Pullman.
861 Q. Was it partitioned around like all Pullmans inside?
A. Not quite that extensive.
862 Q. Was it what is known as a Pullman?
A. Yes, with the circus train it was.
863 Q. You would call it a Pullman car, you know what a regular Pullman sleeper is?
A. Yes, sir.
864 Q. It wasn't one of those?
A. No, sir.

Mr. Kelley:

Q. Of course it might have been at one time so far as you know?
A. Yes, it might have been.
865 Q. It wasn't when you were working?
A. This Pullman car it belonged to Barnum & Bailey in a way.
866 Q. In the manner it was laid out inside it wasn't the same as a Pullman car?
A. No, sir.

Mr. Mahoney:

Q. It was a car that was used as a sleeping car?
A. Yes, sir.
195 867 Q. Had the berths in it and beds where the employes of Barnum & Bailey sleep on the train, or when on travel?
A. Yes, sir.

Mr. Mahoney: We will now offer in evidence so much of American and Carlisle Tables of Expectancy shown under Section 64-68 of Cobbey's Compiled Statutes of 1911, as giving the expectancy of the life of a person thirty-two years of age, being as follows:

"Age 32, life expectancy, American Tables, 33.92. Carlisle Tables, 33.03.

There being no objections the above offered is received.

The plaintiff also offers in evidence so much of the table of the Annuity Present Worth as set out in Cobbey's Statute of Nebraska, for the year 1911, on page 2192, as showing the present worth of a unit of $1.00 per year at figuring money at various rates of interest, 4%, 5%, 6%, and 7% for a period of $1.00 per year for a period of thirty-three years.

Mr. Herdman: That is objected to as incompetent, irrelevant, immaterial, no sufficient foundation laid, and seeking to offer in evidence a table not recognized generally by the courts. And entirely out of footing with the mortality tables.
196 Mr. Mahoney: I withdraw the offer.

JOSEPH MAUCHER resumed the witness stand.

Cross-examination continued,

By Mr. Kelley:

868 Q. I want to ask you when was your last birthday?
A. The Fourth of February.
869 Q. Of this year?
A. Yes, sir.
870 Q. You were thirty-two then?
A. No, sir, I was thirty-three then, thirty-two is the time the accident happened, that is the question that was asked.
871 Q. Thirty-two?
A. Yes, I am thirty-three now.
872 Q. In regard to this Doctor Leaver, what was the occasion of your going to visit Dr. Leaver?
A. On account of my stomach.
873 Q. To see him about those vomiting spells?
A. Yes, sir.
874 Q. Did you tell him about the vomiting?
A. Yes, sir.
875 Q. Not being able to eat certain things?
A. Yes, sir.
876 Q. Told about having passages in which there was blood?
A. No, sir, I never mentioned that to him at all.

877 Q. Did you mention to him that you were unable to do any work?

A. Yes, and could not sleep at night.

197 878 Q. You mentioned about not sleeping?

A. Yes, sir.

879 Q. Anything else?

A. About the violent headaches.

880 Q. Anything else?

A. That is all.

Mr. Mahoney: We will also offer so much of the American Tables of Mortality as shown on page 2190 of Cobbey's Statute as shows the life expectancy of a person 33 years of age, to wit; "33, Life Expectancy, 33.21."

There being no objection the said offer is received in evidence.

Plaintiff rests.

Mr. Herdman: The defendant offers in evidence the stipulation signed by the parties hereto and heretofore filed in this case, marked Exhibit 7.

There being no objection the same is received and read in evidence a copy of which is as follows.

198 (COPY OF EXHIBIT 7.)

In the District Court of Douglas County, Nebraska.

Doc. 127. No. 12.

JAMES CROGAN, Plaintiff,

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Doc. 127. No. 13.

JOSEPH MAUCHER, Plaintiff,

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

It is hereby stipulated and agreed by and between the parties hereto, that the following stipulation shall be read and received in evidence on the trial of the above mentioned cases.

Stipulation.

It is hereby stipulated and agreed, by and between the plaintiff and defendant in and for the purpose of this case:

1. That the allegations all and singular contained in paragraph 5 of defendant's answer, are true.

2. That if, at the trial of this cause, defendant shall produce a paper purporting to be the original of the alleged contract referred to as Exhibit "A" of defendant's answer, and purporting to bear the original signatures of the parties to said alleged contract, it shall be taken and accepted as part of the evidence in this case, that the said signatures are genuine, and that the said instrument was
199 executed by the proper representatives of the parties undertaking to enter into said contract, and that said instrument was at the date thereof, and at the place therein named, duly executed and delivered as between said parties and said paper so produced shall be receivable in evidence in this action, as fully and with like effect as if the execution and delivery thereof, were proved by competent witnesses at the trial.

3. That if, at the trial of this cause, the defendant shall produce a paper purporting to be the original of the paper referred to in paragraph 8 of defendant's answer as Exhibit "B," it shall be taken and considered as proved and established that said paper was signed by the parties, assuming to contract thereby and delivered as between them at the time and place indicated in said paper; and said paper so produced, shall be receivable in evidence as fully and with like effect, as if identified and its execution and delivery proved by competent witnesses at the trial. It shall also be considered as proved, that the plaintiff in this action and the person whose name purports to be attached to said instrument as the employe therein designated, is one and the same person, also that the said paper was executed by the proper representative of the party whose name purports to be attached to said instrument as the employer.

4. That the said Ringlings exhibited their said shows and menagerie at Lincoln, Nebraska, on August 11th, 1913, and in the nighttime of said day, loaded their said circus, menagerie and property and performers and employes, including the plaintiff, on and
200 into a train of coaches and cars belonging to them for the purpose of the continuous transportation of the same, in said coaches and cars, on and over the tracks of the defendant, from Lincoln, Nebraska to Atlantic, Iowa; that the defendant furnished at Lincoln, Nebraska, the necessary locomotive engine and fuel therefor, and engineer, fireman, brakemen, flagman and conductor, to so transport and move said train of coaches and cars and the circus, menagerie, property, performers and employes therein and thereon from Lincoln, Nebraska, to Atlantic, Iowa, as aforesaid; that the defendant furnished said engine, fuel and employees under the contract attached to its answer herein as Exhibit "A" thereof, and said engine and employees did transport, move and operate said train of coaches and cars from Lincoln, Nebraska, and was transporting, moving and operating same, at the time of the collision set forth and mentioned in plaintiff's petition; that plaintiff, at the time he received the injuries complained of in his petition, was riding in and upon said train, and in one of the coaches belonging to said Ringlings, as the employe of said Ringling, for the purpose of being carried thereon, from Lincoln, Nebraska, to Atlantic, Iowa, as such

employe, without having paid, tendered agreeing to pay, or intending to pay any compensation to the defendant for his carriage as aforesaid; that the defendant did not receive, and was not to receive, for the transportation of said train of coaches and cars, and the circus, menagerie, property, performers and employes, including plaintiff, on and over its tracks from Lincoln, Nebraska, to Atlantic, Iowa, as aforesaid, any compensation other than the compensation
201 stipulated in said contract, Exhibit "A," to be paid to the defendant by said Ringlings; that at the time the plaintiff was injured, he was not riding in and on a train transporting or including any advertising car.

5. That the Interstate Commerce Commission of the United States issued its conference rule number sixty-three, Tariff Circular 13A, at the time and in the form as alleged in paragraph nine of defendant's answer. That the defendant filed with said Interstate Commerce Commission its rate notice No. B 1636 at the time and in the form alleged in paragraph nine of defendant's answer. That the contract referred to in said rate notice number B1636 as contract number C136 was and is the same instrument of which Exhibit "A" attached to said answer is a true and correct copy.

MAHONEY & KENNEDY,
Att'ys for Plaintiff.
WILLIAM D. McHUGH,
Attorney for Def't.

February 3rd, 1914.

Endorsed: District Court Douglas County, Nebraska. James Croghan, Pl'ff, v. Chicago, Rock Island & Pacific Railway Company, Def't. Joseph Maucher, Pl'ff, v. Chicago, Rock Island & Pacific Railway Company, Def't. Doc. 127. No. 12. 13. Filed in District Court, Douglas County, Nebraska, Feb. 16, 1914. Clerk's fees 1.00 Paid by W. D. McHugh, Att'y for Def't. Robert Smith, Clerk. Ent. App., Doc. E. O. D.

202 Mr. Herdman: I now offer in evidence Exhibit 8, the same being the original of the contract set forth and mentioned as Exhibit A in defendant's answer.

Mr. Mahoney: The offer is not objected to on any question of identification or proof of execution or delivery, but it is objected to as incompetent, irrelevant, immaterial in that the document itself, and the provisions of the contract are against the public policy of the State of Nebraska, and therefore void.

The Court: I will admit the same subject to objection.

To which ruling of the court the plaintiff, by his counsel, excepted.

Exhibit 8 is received in evidence as follows:

(EXHIBIT 8.)

Contract C-136.

This agreement, made and entered into this Fifth day of June A. D. 1913, at Chicago, Ill., by and between the Chicago, Rock Island & Pacific Railway Company, first party, and Barnum and Bailey Shows second party.

Witnesseth:

Whereas, The second party is the owner of a circus, caravan and menagerie, including horses, wild animals and other articles usually used in connection with and as a part of a circus and menagerie, and the paraphernalia and tents for the same, and the first party is not a common carrier thereof and cannot be required to transport the same, and

Whereas, The second party is also owner of or uses special cars expressly designed and adapted for the carriage of said circus, animals, paraphernalia, tents, etc., and certain railway passenger coaches for the transportation of the performers in said circus, and
203 the agents and employes of the second party in and about the same, and

Whereas, The second party desires to enter into an agreement with the first party for the use of its roadbed and tracks and the necessary engines, engineers and other employes of the first party, for the purpose of moving said cars, equipment and employes of the second party from point to point where performances are to be given on the line of the railroad of the party of the first part.

Now, therefore, the parties hereto have covenanted and agreed and do hereby covenant and agree, each with the other as follows:

The first party agrees to furnish to and for the use of the second party the necessary locomotive engines, with the necessary fuel therefor, and the engineers, firemen and other employes, and the right to use its tracks for the transportation of said circus, menagerie, employes and equipment of the second party, by train of sections, to consist of 15 coaches, 5 box cars, 21 stock cars and 40 flat cars, being a total of 81 cars, from Watertown, S. D. to Davenport, Ia. with the privilege of stopping for exhibition at the following places on the line of said railroad between said points, to wit:

To be received empty from the M. & St. L. Road and moved; Watertown, S. D. to Sioux Falls, S. D. about midnight 8/2/13 and be delivered empty (or loaded) to the I. C. R. R. at Sioux Falls. Thence to be received empty from the C. B. & Q. and moved:

Lincoln, Nebr. to Atlantic, Ia. about midnight.....8/11/13
Atlantic, Ia. to Des Moines, Ia. " " 8/12/13

204

Des Moines, Ia. to Ottumwa, Ia. " " 8/13/13

and be delivered empty to the C. B. & Q. R. R.

Thence to be received empty from I. C. R. R. at Cedar Falls, Ia. and switched to Waterloo, Ia. for loading and movement to Cedar Rapids, Ia. about midnight August 21, 1913, Thence moved:
Cedar Rapids, Ia. to Iowa City, Ia. about midnight.....8/22/13
Iowa City, Ia. to Davenport, Ia. " " 8/23/13

and be delivered empty to the C. M. & St. P. Ry.

and from —— to —— with the privilege of stopping for exhibition at the following places on the line of said railroad between said points, to-wit —— and to haul 3 advance advertising cars, as hereinafter stated.

All movements are to be made during the months of July & August 1913. No change shall be made in the foregoing or in the movement of cars unless ten days' notice in writing shall have been given to the first party and the first party has agreed to make such change, but in no event shall changes be made involving longer or more expensive hauls, unless for such additional compensation beyond that provided for herein as by the first party shall be deemed to be reasonable.

The second party warrants all of the said cars and coaches to be furnished by it as aforesaid, to be in good condition and running order, and hereby agrees, at his or its own cost and expense, to keep same in like good condition and running order, and to this end furnish the men necessary to regularly and properly inspect said cars and coaches, to provide for proper oiling and to make all needful repairs thereof, and to indemnify and save harmless the first party against loss or damage resulting from any defects in said cars or coaches, or from overloading cars, or from the negligence of
205 the second party or any of his or its employes, including those hired to it for the time by the first party, and to return all locomotives and other machinery in the condition received.

The first party may, however, for its own protection, if it so desires, itself inspect the cars and coaches used by the second party, and may cancel this agreement, if it deems such cars or coaches unsafe for use; but no act of the first party in inspecting said cars or coaches shall be understood or deemed to release the second party from any liability for loss, damage or injury that may occur by reason of the defective condition thereof, or from the use thereof in any manner.

It is further agreed that the first party shall not pay mileage for the use of said cars and coaches to be used in the transportation of the second party's circus, menagerie, paraphernalia, etc., and it is further agreed that if the circus, menagerie, paraphernalia, etc., are delivered to the first party in cars for which it would be liable for mileage under usual customs, the second party agrees to pay, in addition to the amounts shown below herein, such mileage as the first party may be or become liable for to the owners thereof.

The first party agrees, at each of the above points, to furnish a sufficient number of engines and employes in connection therewith to enable the second party to do all necessary switching of its cars and train. The second party agrees to diligently and sufficiently inspect

all of said cars and coaches, and to this end will employ a sufficient number of competent inspectors, but such inspectors may
206 be chosen, if the second party shall so elect, from the regular force of inspectors employed by the first party, and in that case no additional compensation shall be paid for this service to the first party.

The second party agrees, for the use of the railroad and engines of the first party, and the necessary engineers, firemen, train despatchers and other employes, to move and work such train, and in further consideration of the first party's agreements herein set forth, to pay to the first party the sum of Thirty one hundred forty five Dollars (3145.00), to be divided and paid in advance as per amounts shown herein.

From Watertown, S. D. to Sioux Falls, S. D.....	$.....
From Lincoln, Nebr. to Atlantic, Ia.....	$.....
From Atlantic, Ia. to Des Moines, Ia.....	$.....
From Des Moines, Ia. to Ottumwa, Ia.....	$3,145.00
From Waterloo, Ia. to Cedar Rapids, Ia.....	$.....
From Cedar Rapids, Ia. to Iowa City, Ia.....	$.....
From Iowa City, Ia. to Davenport, Ia.....	$.....

The said sum for each run to be paid before leaving each point of departure.

The second party further agrees that, on or before the first movement of its circus, car-van or menagerie, under this agreement, it will purchase and pay therefor, at the regular published tariff rates Nine Hundred twenty (920.00) dollars worth of transportation over the lines of the first party, for the exclusive use of the officers, agents, employes and servants of the second party, while traveling upon the regular trains of the first party in connection with the movement of said second party's circus, caravan or menagerie hereunder or in connection with advertising the same.

207 The second party agrees, by means of the service, and at the sole expense of the second party, to receive its cars and coaches from connecting carriers at Watertown, S. D., and to deliver the same to the connecting carriers upon the termination of this agreement at Davenport, Ia., to load and unload all of said cars and coaches and train and to have the same loaded and ready to start from each of the above designated points, at such hour as will make it unnecessary to run faster than ordinary safety will admit.

It is expressly agreed and understood that this agreement is not made by the first party as a common carrier, but only as a hiring of said locomotives, engines and employes, and the use of its railroad to the second party, for the purpose of enabling the second party to move said train between said points; that all of the said cars, coaches and trains shall be operated under the management, directions, orders and control of the second party or its agents.

It is expressly understood and agreed that all engineers, firemen, conductors, brakemen, train despatchers and other operators and employes, furnished by the first party, are, in the operation and move-

ment of said cars, coaches and trains, exclusively the employes of the second party, but all of said cars, coaches and trains shall be run according to the rules, regulations and time cards of the first party.

It is expressly understood and agreed, in consideration of the first party hiring the use of its railway and furnishing the motive power and employes to handle the second party's cars, coaches, paraphernalia and employes, as aforesaid, and for less than it would
208 receive if it handled said circus, cars, paraphernalia, mensgerie and employes, as regular freight and passengers upon its cars, and in consideration of the privilege of stopping over at the points hereinbefore designated, that the first party shall not be responsible or liable to the second party, or to any other person, partnership or corporation, for any delay of any cars or trains, however caused, and whether or not arising from any one's fault or negligence, or for any loss, damage or injury to the property or person of the second party or of any one employed by the second party, or being upon any trains or cars, hauled under this agreement, or being upon any premises of the first party or connected in any way with said circus, caravan or menagerie or with the business of the second party, or for any loss of or damage or injury to the property or person of anyone else, or of any partnership or corporation whatsoever, whether or not such loss, damage or injury arises in any way from, or is in any degree attributable to, any fault or negligence of the first party or any of its officers, agents or employes, in or about the performance of this agreement, or the performance of the first party's general business or in connection with the railroad or property or any duty whatsoever of the first party.

The second party further agrees that it will fully comply with any and all statutes and laws, either of the United States or of any state in which the cars and coaches may be located at any time, regulating the construction or equipment, or otherwise, of cars and coaches, and agrees to indemnify and save harmless the first party from any and all loss, damage, injury, fine or penalty, or claim therefor
209 which may occur to or be imposed against the first party, in any manner arising or growing out of any violation or violations of any such statute or law, and from all costs and expenses whatsoever incident to or connected therewith.

But, if notwithstanding this contractual exemption from liability, the first party shall be held liable in any court for any loss, damage or injury, suffered by the second party on any account, it is hereby agreed in consideration of the special undertaking of the second party and the low rate of charges that such damage shall be liquidated and stipulated not to exceed the actual value of the animals or property aforesaid, which for the purpose of this agreement, and by reason of the said special undertaking and low rate, it is by the second party stipulated, agreed and represented that in no case will exceed the sum per head for each animal as follows:

Elephants, Hippopotami, Giraffes, Rhinoceroses.....	$500.00 each
Horses, Zebras, Lions and Tigers.....	100.00 each
All others of the equine and feline species.....	25.00 each

Buffaloes and others of the bovine species.....	50.00 each
Seals	10.00 each
Monkeys, Crocodiles, Alligators, Serpents and other reptiles	5.00 each
Birds, all species, and other animals not enumerated..	5.00 each

It is further agreed that the value of each chariot, band wagon, calliope or other vehicle, will not exceed $100.00 and that the value of each canvas tent with center poles, ropes and paraphernalia complete, will not exceed $100.00.

The second party further agrees and undertakes, as a further consideration hereof, that in case of delay, loss, damage or injury, to the person or property, either of the second party or any other persons, association of persons or corporation, carried or to be
210 carried upon any of the cars or trains herein specified or employed on or about or in connection with the same on the business of the second party, it, the said second party, will release and does hereby release the first party from all liability or claim therefor for loss, damage or injury to itself or its business or property, will indemnify and for ever save harmless the first party from all claims, demand, actions, causes of action, costs, judgments and expenses, including attorney's fees, resulting from or growing out of such delays, loss, damage or personal injury, the second party hereby assuming and agreeing to defend at its own cost all such claims, demands and actions, and to satisfy and pay the same, and the second party further undertakes and agrees to inform by personal notice, to each thereof, all of the persons permitted by the second party to be carried on any of said cars, coaches and trains, under the terms of this agreement, and to advise and notify all such persons, and each thereof, that they are carried by the second party and not by the first party, and that the first party has not assumed with respect to them or their baggage or other personal property, any of the duties and responsibilities of a carrier of passengers.

It is further agreed that the second party may, at its option, furnish 3 advertising cars, carrying 25, 25 and 22 persons, employed as advance advertising agents, traveling exclusively in said cars. Advertising or other agents, traveling upon ordinary and regular trains of party of first part, shall be provided with proper and regular transportation as above provided. Said cars to be in good order and running condition, and to be equipped with Master Car Builders' Association trucks, running gears, platforms,
211 couplers, etc., and with air brake equipment, and these advertising cars may be attached to trains of the first party, to be designated by it, and hauled from Watertown, S. D., to Davenport, Ia., with the privilege of stopping and being left on the side track at any intermediate station which the second party may designate, at any time between the tenth day of July, 1913, and the twenty-third day of August, 1913, and shall be moved upon notice from the second party, as soon after notice is given as practicable, for the consideration aforesaid, and the first party shall not be liable for any damage to or loss of said cars or property therein or for

injury to or death of the persons carried thereon, whether or not arising from any fault or negligence of the first party, or any of its officers, agents or employes, and the second party agrees to indemnify and save harmless the first party against any loss or damage on account of injuries to or death of persons traveling in said advertising cars, or damages on account of loss or injury to their property, and this stipulation is to be deemed and construed as dependent upon and forming part of the foregoing agreement.

It is a further consideration of this agreement, and the parties hereto agree, that the second party is to have sole charge of every person and of all animals and property on any car, coach or train hauled under this agreement, and the first party does not assume, and shall be under no responsibility for the safety of any of the cars, coaches, persons animals or property on said cars, coaches and trains, in charge of the second party, or of advance agents, from any cause whatever and the second party agrees to, and does hereby indemnify and save harmless the first party against all loss, damage or injury on account of strangers, tramps, or others riding on said cars, coaches or trains, and being injured or killed or on account of strangers, tramps or other persons being injured or killed
212 in the operation of said cars, coaches or trains, or in the handling, loading or unloading of cars, and will protect the first party from damages, and cost incident thereto, suffered by anyone from wild, tamed or domesticated animals escaping from cars or custody, and protect the first party against all loss, damage and cost for and on account of the spread or transmission of any disease to persons or animals from unloading offal or otherwise, and against any fine or penalty arising therefrom which may be imposed against the first party by any State municipality or other competent authority.

The second party covenants and agrees, in consideration of the foregoing, for itself or himself, and for all of the employes or other parties or persons employed or being in or around or in connection with said circus, menagerie or the business of the second party, that in the event of any loss, damage or injury of property or persons for which, in accordance with the terms, stipulations and provisions of this agreement, a cause of action may exist against the first party (It not being intended hereby in any manner to effect or restrict any such terms, stipulations or provisions, the second party for himself and for his employes and such others, will give written notice of such loss, damage or injury to some freight or station agent of the first party within thirty (30) days after the occurrence thereof, and in such notice will state the time, place, nature, cause and amount of such loss, damage or injury. Failure on the part of second party to comply with the requirements of this paragraph shall absolutely bar and defeat any cause of action for any such loss, damage or injury; and if such notice is given, any action for such loss, damage or injury must be brought within
213 ninety (90) days after the occurrence thereof, and not later, any statutes of limitations to the contrary notwithstanding.

The party of the second part further covenants and agrees, that

if any property of the first party or property of others in its possession and control is destroyed, damaged or injured while any cars of the second party are upon the railroad of the first party, under this agreement, and such destruction, damage or injury is done or contributed to by any employe of the second party or by any person connected with said circus or menagerie, or the business of the second party, then in that event the second party will reimburse the first party for such injury, damage or destruction, and for all loss, costs, expenses and recoveries on account thereof, whether or not the acts of the second party's employes, or of the persons connected with said circus, menagerie or business, which caused or contributed thereto, were done in the course of their employment in or about said circus, menagerie or business.

In Witness Whereof, This agreement has been executed by the parties hereto on the day and year first above written.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
By H. GOWERY,
Freight Traffic Manager.
BARNUM & BAILEY SHOWS,
By CHAS. A. WILSON.

214 Mr. Herdman: The defendant now offers in evidence the original of the contract referred to in paragraph 8 of its Answer as Exhibit "B2," and also referred to in such exhibit paragraph 3 of the stipulation in evidence here as Exhibit 7, but here marked Exhibit 9 in this case.

Mr. Mahoney: There is no objection as to the identification. We simply reserve all legal rights as against the validity of this offer, but do not waive any of plaintiff's legal rights by consenting to the paper going in evidence.

The Court: The objection is overruled.

To which ruling of the court the plaintiff, by his counsel, excepted.

The same is received and read in evidence as follows:

(COPY OF EXHIBIT 9.)

Employment Contract No. 22.

This agreement made at Detroit this 9th day of July, 1913, by and between Albert Ringling, Alf T. Ringling, Chas. Ringling, John Ringling and Henry Ringling, copartners, doing business under the firm name of Barnum & Bailey, herein known as party of the the first party as C. H. H. and agrees to work for the first party during part.

Witnesseth: Expressly upon the consideration and conditions herein named, the undersigned second party accepts employment of the first party as C. H. H. and agrees to work for the first party during

the season of 1913 at 20 per month. Expressly on condition that second party continuously remain in the service of first party from date of this engagement to the end of present season, the first party to encourage faithfulness among employes and efficiency in service volunteers as a gratuity to pay second party an additional $—
215 for the last month'- service ending with the close of said circus season; but no rights whatever of second party shall vest regarding said payment, it being merely a gratuity and not affecting the salary hereinabove provided; and nothing in this clause contained shall qualify or limit the right to terminate this contract as hereinafter provided.

As evidence of good faith it is agreed that first party may retain a week's wages of second party until close of season.

It is known and understood by each party and recognized as a valuable consideration of this contract:

(*a*) That the times, manner and means of transportation incident to this employment and circus business increase the risk in travel beyond the ordinary.

(*b*) That the character of the service to be performed involves hazard;

(*c*) That said first party contracts with railway lines over whose tracks they travel, to save transportation companies harmless, even for gross negligence, from any and all claims, demands and damages of employes of first party, and especially second party herein;

(*d*) That such contract between Railway Company as private carrier and first party, furnishes the opportunity of employment of second party

Now therefore, for valuable consideration, and in consideration of this employment and the furnishing of first party to second party of transportation and board of the kind customary and usual in the circus business, and in consideration of special personal benefits and advantages beyond the scope of employment inuring to second
216 party herein, the second party accepts and assumes the increased hazard of railroad travel and circus service in all particulars and circumstances and hereby exempts and releases first party from all claims for injuries, accidents, sickness and damages of whatever nature sustained in said service, whether due to negligence (including gross negligence) of first party, their employes, agents or bosses, or the negligence of any employe of any railroad company transporting first party; and second party, recognizing said privity in railroad transportation, hereby renounces his rights as "passenger" in traveling on any railroad line while in said service, and releases all such railroad companies from claim on his part for any damage or injury whatsoever; and second party agrees to protect, indemnify and hold harmless first party and to pay to first party (and when notified to personally assume payment of) all sums which first party may be subject to pay in consequence of any claim by, or injury, sickness or death to, second party; and second party hereby releases first party from any claim he may in future have due to or growing out of any injury received in said service either as

against first party or any railroad company, hereby binding himself, his heirs, executors and assigns firmly by these presents.

That during said employment the services of a physician and surgeon traveling with said circus, are, so far as his time and circumstances permit, offered free of charge as a gratuity to second party. That said second party is in no manner restricted or obligated to receive said services, but may employ on his own account whomsoever he desires.

217 Second party agrees to faithfully perform his services under this contract, remain sober and refrain from the use of profanity or improper language, obey orders of superiors and bosses under whom he serves abide by all reasonable rules and regulations of first party governing conduct of second party; and it is agreed that if at any time during the life of this contract the services of second party be or become unsatisfactory or his conduct is offensive to first party, first party has the unrestricted right, free from claim or damage, to dismiss the second party from service and terminate this contract; and said terms and provisions are hereby recognized and accepted as a condition of employment under this contract.

It is agreed that if at any time during said season second party accepts service with said circus in a line of employment differing from the present in the character of services to be performed or risk incident, then all the covenants herein contained (except as to salary where changed) shall obtain and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals the day and year first above written.

BARNUM & BAILEY,
By O. STEVENS.
JOS. J. MAUCHARD.

218 I hereby certify that I am over twenty-one years of age, that I understand and am familiar with the character of the services to be performed; that I voluntarily enter into this contract; that in this contract which is solicited by me, I recognize personal special benefits beyond the scope of employment because of extensive travel and incident advantages; that I have carefully read—heard read—the foregoing contract before signing and fully understand the same.

JOS. J. MAUCHARD.

Address #525 W. 2nd St., Cincinnati, Ohio.

Nearest Relative: Mrs. Walter Herbe.
Address, #123 Sumpter St., Brooklyn, N. Y.

(Written on the back:) It is admitted that the signature "Jos. Mauchard" is the genuine signature of the plaintiff in the case now pending in the District Court of Douglas County, Neb., of Joseph Maucher v. C. R. I. & P. Ry. Co.

MAHONEY & KENNEDY,
Att'ys for Pl'ff.

219 Mr. Herdman: The defendant now offers in evidence the decision of the Supreme Court of Illinois in the case of Chicago, Rock Island & Pacific Railway Company, vs. Anderson Hamler, as reported in Volume 215 of the official reports of decisions of said court, page 525 to 541.

Mr. Mahoney: That is objected to as incompetent and irrelevant. The laws of the State of Illinois being irrelevant and immaterial to this issue, and the offer in question not being proof as to what the laws of the State of Illinois are, but there is no question that the offer is the official publication and the statement of the courts, whose decisions it purports to report.

The Court: The objection is overruled.

To which ruling of the court the plaintiff, by his counsel, excepted.

The same is received in evidence, a copy of which is as follows:

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY CO.

v.

ANDERSON HAMLER.

Opinion. Filed June 23, 1905.

1. Carriers.—When a contract releasing liability is not against public policy. A contract of employment as porter for a sleeping car company which releases the railroad company over whose lines the cars are hauled from liability for any injury to the porter when on such lines, is not against public policy.

220 2. Same.—Railroad company not obliged to haul cars of sleeping car company. The duties of a railroad company as common carrier do not require it to haul cars of a sleeping car company, and it has a right, in contracting to haul such cars, to require the sleeping car company to indemnify it against liability for personal injuries received by the sleeping car company's servants.

3. Contracts.—Effect where contract is not signed at time it is dated. A contract of employment at certain daily wages, payable monthly and for no particular time, even though it is not actually signed by the employe at the time the contract is dated, is effective as to any occurrence after its execution and during the continuance of the employment.

4. Same.—Failure to read a contract does not affect its validity. Failure to read a contract before signing it does not affect its validity, where the party was able to read and write and there was no fraud or misrepresentation which prevented him from reading it.

5. Same.—When failure to prove contract is not fatal. In an action by a sleeping car porter against a railroad company for injuries received in a sleeping car being hauled by defendant, failure of the defendant to prove *to prove* its contract with the sleeping car company is not fatal, where the plaintiff's contract of employment proved by the defendant recites that the sleeping car company pro-

cured the operation of its cars on lines of railroad by means of contract, and released from liability any rail road company hauling its cars.

221 6. Negligence.—Gross negligence is but omission of duty. Negligence, whether it be termed slight, ordinary or gross, is but the omission of a duty, and if actionable at all entails but one measure of liability unless the negligence was wilful or intentional, in which case it assumes an entirely different character from that of negligence in its ordinary meaning.

7. Same.—When a contract is a good defense to an action for negligence. A contract between a sleeping car company and its servant whereby the latter released from liability for negligence any railroad company hauling the sleeping cars, is a good defense to an action by him against the railroad company for any negligence occasioning his injury while discharging his duties as the servant of the sleeping car company, short of wilful or intentional negligence.

8. Same.—Unexplained boiler explosion raises no presumption of willful negligence. An unexplained explosion of the boiler of a locomotive does not raise a presumption that the servants in charge of the locomotive, who lost their lives as a result of the explosion, were guilty of willful or intentional disregard of duty.

9. Master and Servant.—Right to give orders is essential to the relation of master. A porter employed and paid by a sleeping car company is not a servant of the railroad company hauling the car of which he is in charge, where he is not subject to the orders of the railroad company in any particular.

Magruder, J., dissenting.

222 Appeal from the Branch Appellate Court for the First District, Heard in That Court on Appeal from the Circuit Court of Cook County, the Hon. Frank Baker, Judge, Presiding.

W. T. Rankin, and Benjamin S. Cable, for appellant.

George E. Dickson, and Castle, Williams & Smith, (Ben M. Smith, of counsel), for appellee.

Mr. Chief Justice CARTWRIGHT delivered the opinion of the court:

On January 18, 1902, Anderson Hamler, the appellee, was a porter in the employ of the Pullman Company in a sleeping car attached to a passenger train of appellant running in a westerly direction in the State of Iowa. As the train passed through a station called Victor the engine exploded. The engineer and fireman were killed and the Pullman sleeping car in which the appellee was at work was thrown on its side and he was injured. He brought this suit in the circuit court of Cook county to recover damages for his injuries, and alleged in each count of his declaration that he was employed by the Pullman Company as a porter; that his duties were the care of the sleeping car, the making up and taking down of berths therein and providing for the necessities and comforts of passengers, and that he

was, with all due care and diligence, performing his duties as such porter when the car was thrown from the track. In the first count he charged negligent, careless and wrongful management and operation of the boiler which exploded and threw the car from the track. In the second count he alleged that the engine was negligently, carelessly and wrongfully equipped with a defective boiler, and the third count contained a general charge of the negligent operation of the train, causing the car to be thrown from the track. There was a plea of the general issue, and upon a trial there was
223 a verdict of guilty and damages were assessed at $15,000. On a motion for a new trial plaintiff remitted $7,500 and judgment was entered for $7,500. Appellant appealed from the judgment to the Appellate Court for the First District, where the cause was assigned to the branch of that court. One of the judges of the branch court presided at the trial in the circuit court and took no part in the consideration of the appeal, and the other judges disagreeing, the judgment was affirmed by operation of law. One of the judges was disqualified and the judgment became final as to controverted questions of fact by operation of law, and not by consideration and judgment of the court.

On the trial the defendant offered in evidence a contract of employment with the Pullman Company, dated January 2, 1902, signed by the plaintiff, the execution of which was admitted by him and which fixed the terms and conditions upon which he accepted the employment and entered into the service of said company. Among other things, the contract recited that plaintiff was aware that the Pullman Company secured the operation of its cars upon lines of railroad by means of contracts wherein said company agreed to indemnify the corporations or persons owning or controlling such lines of railroad against liability on their part to the employes of said Pullman Company, and he thereby released the corporations or persons over whose line of railroad the care of said Pullman Company might be operated, from all claims for liability on account of any personal injury to him while traveling over such lines in said employment or service. This contract was the basis of the defense to the suit, and the defendant tendered to the court an instruc-
224 tion to be given to the jury, that the defendant was not a common carrier of the sleeping cars of the Pullman Company; that it could not be compelled to haul such sleeping cars, but might or might not haul the same, as it desired; that if it undertook to haul such cars in its trains it might do so, and in so doing might make such a contract or demand such conditions as would protect it from liability for injury to the porter or other employes of the Pullman Company on the said cars through negligence, and that if the plaintiff voluntarily entered into the agreement releasing the railroad company from all liability for any injury he might receive while acting as a Pullman porter he could not recover, and the verdict should be that the defendant was not guilty. The court refused to give the instruction.

The principle involved and the rights of the parties under such a contract as this were considered and decided in Blank v. Illinois

Central Railroad Co. 182 Ill. 332, which was an action brought by an employe of the American Express Company for personal injuries received while engaged in the service of the company in an express car. The defense was a contract made by the plaintiff with the express company to obtain employment, by which he released from any liability to him any corporation operating any railroad over which the express cars should run. It was decided that such a contract is valid and not void as against public policy, and that the direction of the court to find the defendant not guilty was justified by the contract, which was a complete defense. There is no difference whatever, in principle, between the case of a porter on a car of the Pullman Company and a messenger in an express car. It is no part of the contract or obligation of a common carrier of pas-
225 sengers to furnish berths, or the services of a porter to make up beds or perform other services for passengers. The passenger pays the Pullman Company for the services performed by it, and not the railroad company, and if one desires such services as are rendered by the Pullman Company and its porter he must contract with that company for them. In its business as a common carrier of passengers a railroad company is bound to carry all who apply and to treat all alike, and its duties and obligations to them are imposed by law. The obligations of a common carrier arise from the public nature of the employment, and being imposed by law, it would be against public policy to allow the obligations so imposed to be changed by a contract exempting the carrier from the consequences of negligence in the employment. A railroad company, in its business as a common carrier, undertakes to use the care and diligence required by law in the transportation of passengers, and will not be permitted to absolve itself from its duties by a stipulation in the contract of carriage by which a passenger is to take the risk of its negligence; but if the service is one that is not imposed upon it as a duty, it may undertake it upon such terms as it may see fit. There can be no doubt that the defendant is not bound to haul sleeping cars tendered to it by the Pullman Company, with its conductors, porters or other employes. The defendant is a common carrier of passengers, and as to them it assumes the duties and liabilities of a common carrier, but the Pullman Company furnishes special facilities and services to passengers, and the defendant is not a common carrier of Pullman cars and employes performing duties therein. The defendant might undertake to receive and
226 haul the cars of the Pullman Company, but in doing so had a right to impose such terms as it might elect. This has been the opinion of the courts in all cases involving such contracts as the one here in question, which have been enforced in cases of express cars, circus trains and Pullman cars, which the carrier was not bound to receive and haul as a common carrier. (Bates v. Old Colony Railroad Co. 147 Mass. 255; Hosmer v. Old Colony Railroad Co. 156 id. 506; Louisville, New Albany and Chicago Railroad Co. v. Keefer, 146 Ind. 21; Pittsburgh, Cincinnati, Chicago and St. Louis Railway Co. v. Mahoney, 148 id. 196; Robertson v. Old Colony Railroad Co. 156 Mass. 526; Griswold v. New York and New

England Railroad Co. 53 Conn. 371; Coup v. Railroad Co. 56 Mich. 1; Express cases, 117 U. S. 1; Peterson v. Chicago and Northwestern Railway Co. 96 N. W. Rep. 532; Donovan v. Pennsylvania Co. 120 Fed. Rep. 215; New York and Hudson River Co. v. Difendaffer, 125 id. 893, McDermon v. Southern Pacific Railway Co. 122 id. 669.) In the last two of these cases the validity of the contract with the Pullman Company was involved. In the case of Blank v. Illinois Central Railroad Co. supra, appellant, relied upon the decision of Judge Taft in Voigt v. Baltimore and Ohio Southwestern Railway Co. 79 Fed. Rep. 561, but that decision was reversed by the Supreme Court of the United States in Baltimore and Ohio Southwestern Railway v. Voigt, 176 U. S. 498, where it was held that Voigt could not avoid his agreement on the ground that it was against public policy. The court, affirming the doctrine that a common carrier of p-ssengers cannot lawfully stipulate for exemption from responsibility for the n-gligence of himself or his servants, said:

227 "At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare." Upon an extensive review of the authorities it was decided that the contract was not against public policy, but was valid and constituted a defense to the action.

It is urged, however, that the contract is this case was without consideration, and was therefore void. Upon the cross examination of the plaintiff he was presented with the contract and admitted that he signed it. It bore date at the time of his employment by the Pullman company, but after it was introduced in evidence by the defendant he was recalled in rebuttal and testified that it was executed by him about seven months after he was employed by the Pullman company, and that he did not read it. It is on the ground that the contract was executed after the employment began that counsel urged it was without consideration. There was evidence that the contract was signed before employment was given to the plaintiff; but whatever the fact may be, the employment was at certain daily wages, payable monthly, and for no particular time. The contract bore date at the commencement of the service, and recited on its face that it was entered into in consideration of the employment. If it was signed as he claimed and the employment continued, it would be, in any event, effective as to any occurrence after its execution. It does not seem to be claimed that plaintiff was not bound by the *by the* contract because he did not

228 choose to read it. He testified that he was able to read and write, and there was no evidence of fraud or misrepresentation or that he was in any manner prevented from reading the contract. Under such circumstances the fact that he did not read it does not affect its validity.

It is contended that the plaintiff was a servant of the defendant, and that the contract was also void as a contract between master

and servant. The declaration averred that the plaintiff was in the employ of the Pullman company, and, as a question of fact, the uncontradicted evidence was that the Pullman company owned the car and had charge of its operation; that it employed the men who ran the cars, paid the porters, and that the defendant paid a compensation to the Pullman company for running the Pullman cars over its road.

The master of a servant is one to whose order he is subject, and the plaintiff was not subject to the order of the defendant in any particular and therefore was not its servant. Under this head it is also urged that no contract was proved between the defendant and the Pullman company. Plaintiff's contract recited that the Pullman company secured the operation of its lines of railroad by means of contracts, and it released from liability any corporation over whose lines the cars should run. In Russell v. Pittsburg, Cincinnati, Chicago and St. Louis Railway Co. 61 N. E. Rep. 678, in which a contract identical with this one was under consideration, the Supreme Court of Indiana held that the contract, referring generally, to the transportation companies over whose lines the Pullman company should run its cars, comprehended the appellee in that case; that the contract was prima facie for its benefit, and
229 that it would be presumed to have accepted its provisions and might claim rights under it as one in whose interest it was executed.

Finally, it is contended that a contract of this character only exempts from liability for ordinary negligence, and is no defense in an action for an injury caused by gross negligence. It is contended if the degree of negligence is high and the negligence great the agreement is of no affect, and the trial court adopted that view in giving instructions to the jury. In the first instruction the Court defined gross negligence as the want of slight diligence and care, and in other instructions told the jury that if the plaintiff was not guilty of negligence and the defendant was guilty of gross negligence they should find for the plaintiff, and that if the contract in evidence was signed by the plaintiff and he was not guilty of negligence and the defendant was guilty of gross negligence causing the injury, the contract was not a good defense and they should find for the plaintiff. The cause of the explosion was not definitely proved, but there was evidence that tended to show that the water was low in the boiler. The engineer and fireman were both killed, and it can never be known whether they were misled on account of the water gauge or other appliances not working properly. There was no evidence tending in the remotest degree to prove that there was any willful or intentional failure on the part of either of them to perform any duty respecting the boiler or the management of it. Their own safety was involved, and there can be no presum-tion that they lost their lives through a willful or intentional disregard of duty.

We are of the opinion that no distinction as to the rights of the parties can be founded upon speculation as to different de-
230 grees of mere negligence, and that the trial court erred in instructing the jury to find for the plaintiff if they concluded

that the defendant was guilty of gross negligence. Formerly, this court, in expounding the doctrine of comparative negligence, classified negligence in three degrees, as slight, ordinary and gross; but that doctrine was — ago abolished, and while negligence may since that time have been alluded to in opinions as gross or slight, no weight has been given to the question and no liability has been based on any distinction in degrees unless the negligence was willful or intentional, where it assumes an entirely different character from that of negligence in its ordinary meaning. In negligence, merely, there is no intention to do a wrongful act or omit the performance of a duty. (Chicago, Burlington and Quincy Railroad Co. v. Johnson, 103 Ill. 512.) Even when gross it is but the omission of a duty. (Jacksonville Southeastern Railway Co. v. Southworth, 135 Ill. 250.) The many refinements concerning the degree of such omissions of duty grew out of the application of the rule of comparative negligence, and were divested of all importance by the decision that to justify a recovery the person injured must be in the exercise of ordinary care and the injury must have resulted from a want of ordinary care on the part of the defendant. (Calumet Iron and Steel Co. v. Martin, 115 Ill. 358.) The rule since that time has been, that if a plaintiff has exercised ordinary care and the defendant has failed to exercise due care,—i. e., the care demanded under the circumstances,—the rights of the parties are thereby fixed and determined and there is an end of controversy. If those conditions exist there is actionable or culpable negligence, which will justify a recovery of damages resulting therefrom,
231 and it makes no difference in the liability or the damages by what name the negligence is designated. Where an injury results from a failure to exercise ordinary care and not from willful or intentional failure to perform a duty, the question of degree is of no importance. Speculations on that subject lead to no practical result, as shown by the various cases, among which is Lake Shore and Michigan Southern Railway Co. v. Hessions, 150 Ill. 546, where it was said that slight negligence is not necessarily incompatible with due and ordinary care, and inasmuch as there is no negligence unless there is a failure to exercise due care, which is the care required by law under the circumstances of a case, the remark was equivalent to holding that slight negligence was not negligence at all.

Where the doctrine of comparative negligence is not applied the authorities make no distinction in rights, duties or liabilities based on degrees of negligence. Judge Cooley, in his works on Torts, (p. 630) says, "Some writers classify negligence as gross negligence, ordinary negligence and slight negligence. But this division only indicates this: That under the special circumstances great care and caution were required, or only ordinary care, or only slight care. If the care demanded was not exercised the case is one of negligence, and a legal liability is made out when the failure is shown." Judge Thompson classifies negligence as of two kinds; negligence, which consists of carelessness and inattention, and willful negligence, consisting of willful and intentional failure or neglect to perform a

duty; and he repudiates any further classification. He says (1 Thompson on Negligence, sec. 18): "Lord Holt, C. J., in a celebrated case divided diligence into three degrees; slight, ordinary and gross. In this he is supposed to have made an attempt to
232 follow the Roman law; but later investigators have pointed out that culpa levissima, or slight negligence, was unknown to the Roman law, but was one of the refinements of the middle ages. I confess myself careless, ignorant and indifferent upon this whole subject of the degree of negligence. It is plain that such refinements can have no useful place in the practical administration of justice. Negligence cannot be divided into three compartments by mathematical lines. Ordinary jurors, before whom, except in cases in admiralty, actions grounded on negligence are always tried, are quite incapable of understanding such refinements. * * * No effort can extract from the current American decisions the conclusion that there are three degrees of culpable negligence: slight, ordinary and gross. On the one hand, it has been held that slight negligence may be compatible with ordinary care, and therefore not actionable at all. On the other hand, it has been laid down that there is no distinction between gross negligence and the want of ordinary care." * * * If the care demanded is not exercised the case is one of negligence, and the legal liability is made out when failure is shown." The author of the chapter on Negligence in the American and English Encyclopedia of Law, (2d ed. Vol. 21, p. 459,) says: "While not infrequent references are still found in judicial discussion of the subject to the classification of negligence into degrees, the tendency of modern authority and the wieght of the best considered cases are now opposed to this view, holding that in every case of negligence, however described, is merely a failure to bestow the care and skill which the situation demands, and hence it is more accurate to call it simply
233 negligence. Some decisions even go further, and declare that the classification of negligence into degrees is a matter of pure speculation and of no practical consequence: that it is useless and tends to confusion, and that, in fact, it is unsafe to base any legal decisions on distinctions in the degrees of negligence."

One of the reasons given by the courts for disregarding supposed distinctions in degrees of negligence is the inability to give the terms "slight," "ordinary," and "gross" any definite meaning and the impracticability of applying any rule based on the supposed distinction. It is clear that negligence cannot be divided into slight, gross and ordinary by definite lines, so that a jury may understand the limits of each and assign each case to its own department. In Hinton v. Dibbin, 42 Eng. C. L. 847, Lord Denman said: "Again, when we find 'gross negligence' made the criterion to determine the liability of a carrier who has given the usual notice, it might perhaps be reasonably expected that something like a definite meaning might have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject is any such attempt made, and it may well be doubted whether between 'gross

negligence' and negligence, merely, any intelligible distinction exists."

In Steamboat New World v. King, 16 How. 469, it was said: "The theory that there are three degrees of negligence described by the terms "slight," 'ordinary' and 'gross' has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed or capable of being so. * * * Recently the judges of several courts have expressed their disapprobation of these attempts to fix the degrees of diligence by
234 legal definitions and have complained of the impracticability of applying them. * * * It may be added that some of the ablest commentators on the Roman law and the civil code of France have wholly repudiated this theory of three degrees of diligence as unfounded in principles of natural justice, unless in practice and presenting inextricable embarrassments and difficulties."

In Perkins v. New York Central Railroad Co. 24 N. Y. 196, the court of appeals said: "The difficulty of defining gross negligence, and the intrinsic uncertainty pertaining to the question as one of law, and the utter impracticability of establishing any precise rule on the subject, renders it unsafe to base any legal decision on distinctions of the degrees of negligence. Certainly, before cases are made to turn, by verdicts of juries, upon any such distinction, the judges should be able to define with some precision what they mean by gross negligence, slight negligence and ordinary negligence. It will be seen, on examining the many cases reported where the question has arisen, that this has been found utterly impracticable by judges when called upon to instruct juries upon the question and also when called on to declare the law more carefully in bank. * * * What is negligent in a given case may be easily affirmed by a jury, but in what degree the negligence consists in any scale of classification of degrees of negligence is not so easily determined, will ordinarily be a matter of pure speculation and of no practical consequence."

In Wilson v. Brett, 11 Meeson & Welsby, 113, it was held that there is no legal difference between negligence and gross negligence; that is the same thing with the addition of a vituperative epithet, and that the question in any case is whether there was culpable negligence.

In Grill v. General Iron Screw Collier Co. 1 Com. p. 600,
235 it was complained that the Lord Chief Justice misdirected the jury because he made no distinction between gross and ordinary negligence. In deciding the case Wiles, J., said "I quote agree with the dictum of Lord Cranworth in Wilson v. Brott. that gross negligence is ordinary negligence with a vituperative epithet—a view held by the Exchequer Chamber. (Beal v. South Devon Railway Co.) Confusion has arisen from regarding negligence as a positive, instead of a negative, word. It is really the absence of such care as it was the duty of the defendant to use."

In the case of Beal v. South Devon Railway Co. 3H. & C. 336, above referred to, the failure to exercise reasonable care, skill and

diligence was called gross negligence, although it would be called ordinary negligence under most definitions where there is any division into degrees.

It will be found that the words "slight," "ordinary" and "gross," as applied to negligence, are not used in the decisions with the same meaning or any definite and well understood meaning. Illustrations are numerous, but a few will suffice for the present purpose. The words "gross negligence" are often used as the antothesis of "slight care," but in many relations the law only requires the exercise of slight care, and the failure to exercise it cannot be different in degree from the failure to exercise a very high degree of care where it is demanded by law. The absurdity of such a standard for determining supposed degrees of negligence is manifest. It has been noted that slight negligence is not regarded as inconsistent with due care,
and if due care is exercised there is no actionable negligence,
236 and therefore, in a legal sense no negligence at all. In Bloor v. Town of Delafield, 69 Wis. 273, it was held that a slight want of ordinary care on the part of the plaintiff contributing approximately to cause the injury would defeat his action, while only slight negligence on his part contributing thereto would not. The Supreme Court of Wisconsin also holds that no mere degree of carelessness or inadvertence constitutes gross negligence (Decker v. McSorley, 116 Wis. 643, and that the term "gross negligence" signifies willfulness, involving intent, actual or constructive, to cause injury, and if one is guilty of willful misconduct causing injury to another the former's fault is denominated gross negligence. (Rideout v. Winnebago Traction Co. 101 N. W. Rep. 672.) In C., M. & B. R. R. Co. v. Crocker, 95 Ala. 412, the court drew a distinction between negligence charged to be reckless and a willful and wanton injury, and in Stringer v. Alabama Mineral Railroad Co. 99 Ala. 397, it was said: "The words 'gross' 'reckless,' when applied to negligence per se, have no legal significance which imports other than simple negligence or a want of due care." The court recognized but two grades of negligence, one being simple negligence or the want of due care, and the other such reckless or wanton disregard of probable consequences as to be equivalent to an intentional injury, and expressed doubt whether the latter could be strictly and technically called negligence—certainly a well founded doubt. In McAdoo v. Richmond and Danville Railroad Co. 105 N. C. 140, it was held that in torts there is no degree of negligence which can be described by the word "gross" alone. In Milwaukee and St. Paul Railroad Co. v.
Arms, 91 U. S. 489, the court after citing and quoting from
237 the English decisions holding that there is no intelligible distinction between ordinary and gross negligence, said: "Gross negligence is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied the term 'ordinary negligence,' but after all it means the absence of care that was necessary under the circumstances." In Smith v. New York Central Railroad Co. 24 N. Y. 222, it was said: "Attempts have been made to fix a liability upon the distinction between gross negligence

and negligence merely, but courts have been compelled to abandon the attempt, and to say that negligence does not change its character and become anything but negligence by the application of any epithet to it."

The United States Circuit Court of Appeals for the seventeenth circuit considered the same question involved in this case in Kelley v. Malott, at the October term, 1904. The suit was for damages on account of the death of a messenger of the Adams Express Company, and the declaration charged that he was killed in a collision that occurred through the gross negligence of the defendant. A contract similar to the one in this case was pleaded, and the question was whether the injection of the word "gross" in the declaration made out a case despite the plea. The court said: "It seems to us that the whole attempt to classify negligence has resulted from a misapprehension. 'Negligence' is merely a word of denial. 'Care' is the positive word. It is familiar and sound doctrine that there are degrees of care. But 'care' cannot properly be divided into abstract and absolute classes. The quantum of care required in a particular case is determined from the relations of the parties and the
238 facts of the situation, and is proportionate to the danger reasonably to be apprehended. Whatever the required degree of care, the failure to measure up to it is the ground of complaint. But failure is failure. The cause of action flows from the failure to exercise the full degree of care that was due. The injuries are what they are. The innocent sufferer is entitled to full compensation on account of the defendant's failure to bestow the fullness of care demanded by the situation. He is to receive no more, or less, than full compensation, because, though the defendant's lack may be a variable, any lack supplies a cause of action, and his injuries, which measure the value of the cause of action, are a constant. The division of negligence into slight, ordinary and gross, may have originated in an endeavor, unconscious perhaps, to justify exemplary damages where only compensative should be allowed. One who unintentionally fails in his duty and thereby causes an injury should make complete compensation. But to warrant punishment there must be an actual or constructive intent to inflict the injury. Negligence and willfulness are as unmixable as oil and water. 'Willful negligence' is as self-contradictory as 'guilty innocence.' The substantive remains the substantive, whatever the adjective. In Railroad Co. v. Lockwood, 17 Wall. 357, the Supreme Court said: 'In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands, and hence it is more strictly accurate, perhaps, to call it simply 'negligence.' And this seems to be the tendency of modern authorities. * * *
239 In the case before us, the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad company to persons carried on its trains. A failure to exercise such care and diligence is negligence. It needs no epithet properly and legally to describe it.'—See, also, Milwaukee, etc., Railway Co. v. Arms, 91 U. S. 468, 492; Purple v. Union Pacific Railroad

Co. 114 Fed. Rep. 123." Whether the use of the word "willful" negligence is proper and consistent or not, then there can be no doubt that it is not equivalent to gross negligence, and the question whether exemplary damages shall be awarded does not justify any classification into degrees, since negligence, however gross, will not authorize such damages. A tort must be aggravated by an evil intent to enable a party to recover exemplary damages. (Milwaukee and St. Paul Railway Co. v. Arms, supra.) The only question in any case is whether there is actionable negligence, and if there is, the authorities establish the proposition that the rights of the parties are not affected by any question of the degree of such negligence. The instructions that the contract was not a good defense in case the jury found the defendant guilty of gross negligence were incorrect and should not have been given.

At the close of all the evidence there was a motion on the part of the defendant to direct a verdict of not guilty. The court denied the motion and refused to give the instruction. Under the authority of Blank v. Illinois Central Railroad Co. supra, that instruction should have been given.

The judgments of the Appellate Court and Circuit Court are reversed and the cause is remanded to the circuit court.

Reversed and remanded.

Mr. Justice Magruder, dissenting.

240 Mr. Herdman: The defendant also offers the decision of the Supreme Court of Illinois in the case of Blank, Jr. vs. the Illinois Central Railroad Company, reported in Volume 182 of the Official Reports of said court, page 332.

Mr. Mahoney: Objected to as incompetent, irrelevant, the laws of the State of Illinois being irrelevant and immaterial to this issue, and the offer in question not being proof as to what the laws of the State of Illinois are. But there is no question that the offer is the official publication of the statements of the courts whose decisions it purports to report.

The Court: The objection is overruled.

To which ruling of the court the plaintiff, by his counsel, excepted.

The same is received in evidence, a copy of which is as follows:

241 JOHN P. BLANK, JR.

v.

THE ILLINOIS CENTRAL RAILROAD COMPANY.

Opinion Filed October 19, 1899. Rehearing Denied December 9, 1899.

1. Evidence—When the contract set up in special pleas is admissible though demurrer to pleas was sustained. A contract set up as a defense in a special plea, to which a demurrer has been sustained,

it is not for that reason inadmissible in evidence under the general issue, if relevant and otherwise objectionable.

2. Carriers—Railroad company may exempt itself from liability for injury to express messenger. A contract between a railroad company and an express company, which provides that the former shall not be liable for negligence respecting injury to the express company's employes as a condition to granting the right to carry express on trains, is not against public policy.

(Magruder, *J.*, dissenting.)

3. Same—An express messenger riding in an express car, attending to express business, is not a passenger. An express messenger carried in a special car and under a special contract to attend to his employer's business is not a passenger.

(Magruder, *J.*, dissenting.)

Blank v. Illinois Central Railroad Co. 80 Ill. App. 475. Affirmed.

242 Appeal from the Branch Appellate Court for the First District, Heard in That Court on Writ of Error to the Superior Court of Cook County, the Hon. John Barton Payne, Judge, Presiding.

Strong, Milsted & Ehle, and W. F. Struckmann, for appellant.

A Master cannot, by a contract with a servant, in consideration of the employment, exempt himself from liability to the servant for injuries sustained through the negligence of the master and for which he would otherwise be liable, such a contract being void as against public policy, 14 Am. & Eng. Ency. of Law, 910; Railroad Co. v. Orr, 91 Ala. 548; Roesner v. Herman, 8 Fed. Rep. 782; R. & D. Co. v. Jones, 92 Ala. 218; Johson v. Railroad Co. 86 Va. 975.

The question whether there was negligence on the part of appellee is one of fact for the jury. Railroad Co. v. Ashline, 171 Ill. 320; Railway Co. v. Brown, 152 id. 484.

The degree of negligence is a question of fact for the jury. Railway Co. v. Brown, 152 Ill. 484; Railroad Co. v. Murowski, 179 id. 77.

An express messenger, when carried under a contract with a railroad company, made by the express company, for the transportation of express matter in his charge, is a passenger for hire. Voight v. Railway Co. 79 Fed. Rep. 561; Fordyce & Jackson, 56 Ark. 594; Blair v. Railroad Co. 66 N. Y. 313; Railway Co. — Ketcham, 133 Ind. 346; Jones v. Railway Co., 125 Mo. 666; Yeomans v. Navigation Co. 44 Cal. 71; Railway Co. v. Wilson, 79 Tex. 371.

A contract void as against public policy cannot be held good for any purpose. Lumber Co. v. Hayes, 76 Cal. 387; Hunt v. Herring, 21 N. Y. Supp. 245; Bishop on Contracts, secs. 188, 611; Clark on Contracts, 471; Anson on Contracts, 252; McNamara v. Gargett, 68 Mich. 454.

243 A railroad company cannot exempt itself from liability for negligence to a passenger. Arnold v. Railroad Co. 82 Ill. 272; Hart v. Railroad Co. 112 U. S. 338; Railroad Co. v. Derby, 14

How. 483; Railroad Co. v. Beebee, 174 Ill. 24; New World v. King, 16 How. 469; Railway Co. v. Lockwood, 17 Wall. 359.

Edwin Walker for appellee.

The right of a railroad company to insist upon an accident release from an express messenger riding in a baggage car, although riding upon a passenger season ticket, is upheld by the Supreme Court of Massachusetts in Bates v. Railway Co., 17 N. E. Rep. 633, and Hosmer v. Railway Co., 31 id. 652.

Railroad companies are not required, by usage or common law, to transport the traffic of independent express companies over their lines in a manner in which the traffic is usually carried and handled; and they need not, in the absence of a statute requiring it, furnish to such express companies equal to facilities for doing an express business upon passenger trains. Railroad Co. v. Keefer, 44 N. E. Rep. 798; Express cases, 117 U. S. 1; 6 Sup. Ct. 542; Sargent v. Railroad Corp., 115 Mass. 416.

Railroad companies are common carriers, and as such have a right to restrict liability by such contracts as may be specially agreed upon; they still remain liable for gross negligence or willful misfea-nce. Railroad Co. v. Morrison, 19 Ill. 135; Western Trans. Co. v. Newhall, 24 id. 466; Railroad Co. v. Reed, 37 id. 485; Railroad Co. v. Smyser, 38 id. 355; Express Co. v. Haynes, 42 id. 89; Railroad Co. v. Frankenburg, 54 id. 88; Railway Co. v. Montfort, 60 id. 175; Express Co. v. Stettaners, 61 id. 134; Field v. Railroad Co. 71 id. 244 458; Arnold v. Railway Co. 83 id. 273; Hawk v. Railway Co. 147 id. 399; Railroad Co. v. Simon, 160 id. 648; Railway Co. v. Chapman, 133 id. 96.

Mr. Chief Justice CARTWRIGHT delivered the opinion of the court:

Appellant was an express messenger in the employ of the American Express Company, and on January 15, 1896, was engaged in the performance of his duties for that company in the forward half of the baggage and express car, being the portion of such car furnished by appellee to the express company for doing its business on appellee's line. When the passenger train of which this car was part was nearing Rockford from the east, a freight train drew in on a side-track to let it pass. The freight train had to stop twice to turn switches, and when it finally got in on the side-track a coupling link had broken, so that the engine lost control of the rear part of the train and the caboose stood too near the main track. If the link had not broken it would have been on the sidetrack out of the way seven minutes before the arrival of the passenger train. The baggage and express car struck the caboose and appellant was injured. He sued appellee for damages, alleging in both counts of his declaration that he was upon the car in the discharge of his duties as messenger for the express company, and charging, in the first count, negligence in allowing the freight train to stand on the side track in such manner as to collide with it, and in the second, negligence in running the express car against the sidetracked train. There was a trial, at which it was proved without dispute that the breaking of

the link, which left a part of the freight train too near the main track, was due to a latent defect which could not be detected.
245 The only question on the subject of negligence was whether or not there was time enough, with proper exertions, to couple up again and get out of the way. There was no evidence of anything like gross negligence or willful conduct.

The defendant proved and offered in evidence a contract made by the plaintiff with the express company to secure employment, by which he assumed all risks of accidents and injuries in the course of his employment occasioned by the negligence of any corporation operating any railroad and releasing such railroad company from any liability to him, also a contract, referred to in plaintiff's said contract, made by American Express Company with the defendant in order to have its merchandise and property and employees carried by defendant and its business carried on upon defendant's line, by which the express company agreed to indemnify and save harmless the defendant against all liability for loss or damage resulting in any manner to the express matter, or the employees, agents, messengers or officers of the express company. After all the evidence was in, the court instructed the jury to find the defendant not guilty, which was done, and judgment rendered accordingly. An appeal was taken to the Appellate Court, where the judgment was affirmed, and a certificate of importance being granted the case was brought here.

The admission in evidence of the accident release, and the contract between the defendant and the express company, to which it referred, is assigned as error. The ground of the objection to them is, that the contract had been set up as a defense in special pleas, to which demurrers had been sustained. The sustaining of such demurrers would not affect the admissibility of the contract
246 under the general issue if it were otherwise admissible, and it was relevant and admissible under such general issue. The plaintiff alleged and testified that he was in the employ of the express company as express messenger, and on his cross-examination it appeared that he had signed this contract fixing terms and conditions of his employment. It was proper to show such terms, and the claim that the contracts were not admissible under the issue cannot be sustained.

The main question in the case concerns the validity and legal effect of plaintiff's contract. The ground of attack upon the contract is that it is void, as against public policy. It is first argued that it is a contract of employment between the plaintiff and the express company, which is contrary to public policy, as exempting the employer from the consequences of its negligence. It is insisted that an employer cannot stipulate for immunity against his own negligence, and that a contract intended to have that effect is void, as tending to relax the employer's care and to increase the perils of the occupation. The question thus sought to be raised has no relation to this case, since the contract is not sought to be enforced for the purpose of relieving plaintiff's employer, the express company, from the consequences of its negligence or affording it immunity for its wrongful

act. It is not alleged or claimed by any one that the employer was in fault or neglected any duty toward the plaintiff.

The question is whether the defendant had a right, in taking the express company and its business and employes upon its
247 road to make the contract that it should not be liable for the negligence of its employes.

It is insisted that the plaintiff occupied the position of a passenger for hire, and that the public policy will not permit a contract to be made releasing a carrier from liability to a passenger for its negligence. If the defendant was a common carrier of the American Express Company and its goods and messengers doing business on the line in the express car in question, the authorities cited in support of that position would be applicable; but it seems to be settled that a railroad company is not a common carrier of other common carriers and their business. Each of the parties is a common carrier for the public, and the railroad company is not bound to furnish facilities to every express company that applies for carrying on its business on its road. It is not charged with the duty of carrying express companies at all, and is therefore entitled to make a special contract establishing the duty and liability of the railroad on its side and of the express company on the other. The Supreme Court of the United States so held in the express cases. (117 U. S. 1,) and pointed out the reasons why special contracts in reference to such business are necessary. A railroad company takes an express company on its road by virtue of a special contract, in which the rights and duties of the parties are defined in such manner as, in the opinion of the parties, will be most suitable or beneficial to them. Such a control gives to the express company rights superior to other express com-
248 panies and to the general public, which it has no right to demand, and which the railroad company is under no obligation to furnish except upon terms agreeable to it. In this instance such a contract was made by virtue of which the express company's goods, and the plaintiff, as its employee, were upon the car, carrying on the business of the express company as a common carrier. Plaintiff was being carried for the sole purpose of handling and caring for the express company's goods, which were being carried under the terms of the special contract and which the defendant was not otherwise bound to carry at all. The question whether, under such circumstances, a contract relieving the carrier from liability for negligence merely is valid has several times been considered. The principle was sustained in Bates v. Old Colony Railroad Co., 147 Mass. 255, and Hosmer v. Old Colony Railroad Co., 156 id. 506; and in two cases in Indiana contracts in all respects like those made in this case, have been sustained by the Supreme Court. (L., M. A. & C. R. R. Co. v. Keefer, 146 Ind., 21; P., C., C., & St. L. R. R. Co. v. Mahoney, 148 id. 196.) The contract gave the express company, and plaintiff, as its messenger, rights which defendant, as a common carrier, could not have been compelled to grant, and in such a case a carrier may contract as a private carrier, and require exemption against liability for negligence as a condition of granting such rights. An agreement to take and carry property in such a

case, under such conditions as the parties agree upon, is held not to be against public policy.

As against these decisions we are not referred to any decision of a court of last resort, and the only opinion to the contrary cited
249 by counsel is one by Judge Taft, passing upon a demurrer to an answer in a trial court. In that opinion the Judge expressly disapproves of the decisions of the Supreme Court of Indiana, and reaches the opposite conclusion by the following course of reasoning: In the absence of a contract exempting a railroad company from liability, the relation between a railroad company and an express messenger is that of public carrier to a passenger for hire; a railroad company is under no obligation to carry an express messenger, as such, but he is not a different kind of freight from any ordinary passenger, except that he travels in a special car; he would have the right to demand of a railroad company that he should be carried in a passenger car if he tendered his fare; therefore, when it carries him as an express messenger in the car provided for the express matter and messenger it is discharging its function as a common carrier of persons, and he does not lose his right and character as a passenger.

In other words, the opinion concedes that a railroad company is not a common carrier of other common carriers and their messengers, but holds that if it makes a special contract to carry them it does so as a common carrier and in the performance of its function and duty as a common carrier. The holding there is, that one who contracts with a carrier specially for unusual privileges, which he could not demand and the carrier is not bound to grant but which are conceded upon special conditions, is not bound by his contract.

250 It is true that a messenger would be entitled to be carried in a passenger car if he tendered his fare, but a railroad company is not bound to carry an express messenger with his goods, for the purpose of carrying on business on its road in a passenger car or any kind of a car. The messenger is not carried in the capacity of a passenger, but in a special car to do his employer's express business, and the common acceptation of the word "passenger" would not embrace such a person so engaged. We do not see how it could follow that because a person who is an express messenger might be a passenger in a passenger car he is also a passenger while doing his employer's business in the express car. The reasoning of the other courts seems to us the sounder and better.

An attempt is made to liken this case to the case where a person is carried with his stock of goods and where he is regarded as a passenger. There are many such cases where the carrier is bound to receive and carry goods, or stock, and where, by general usage or by the rules of the company, the owner or his agent may go or is required to go in charge of the property. In such case the owner is entitled to demand the carriage of his property as a part of the duty of the railroad company toward the public as a common carrier, under the conditions fixed by the law. The railroad company is bound to receive and carry for anybody who shall appear, and by the rules or usage of the company the charge for carrying the stock includes the carrying of the person in charge. Such a person is a

passenger. But the difference in the relation between such a case and this is apparent.

251 The plaintiff acknowledged the execution of the contract which was a bar to his cause of action, and the direction of the court to find for the defendant was justified thereby.

The judgment of the Appellate Court is affirmed.

Judgment Affirmed.

Mr. JUSTICE MAGRUDER, dissenting:

I concur in the views expressed by Judge Taft referred to in the opinion and found in Voight v. Baltimore and Ohio Southwestern Railway Co. 79 Fed. Rep. 561. In that case it is held, and to my mind conclusively demonstrated, that, "while a railroad company is under no obligation to carry an express messenger as such, yet, when under a contract with the express company, it does carry him, it is discharging its functions as a common carrier of persons, and he does not lose his rights and character as a passenger because he travels in a special car provided by the railroad company;" and that "a contract, whereby a passenger on a railroad train agrees not to hold the railroad company liable for injury to him caused by the negligence of the company or its servants, is void as against public policy, and this rule applies to an express messenger carried by a railroad company in a special car under a contract with the express company."

252 Mr. Herdman: The defendant offers in evidence the decision of the Supreme Court of Michigan in the case of Coup vs. Wabash, St. Louis & Pacific Railway Company, as reported in Volume 56 of the official reports of said court, page 111.

Mr. Mahoney: That is objected to as incompetent, and irrelevant. The laws of the State of Michigan being irrelevant and immaterial to this issue, and the offer in question not being proof as to what the laws of the State of Michigan are. But there is no question that the offer is the official publication of the court whose decision it purports to report.

The Court: The objection is overruled.

To which ruling of the court the plaintiff, by its counsel, excepted.

The same is received and read in evidence, a copy of which is as follows:

253 WILLIAM C. COUP

v.

THE WABASH, ST. LOUIS & PACIFIC RAILWAY CO.

Common Carriers—Duty of Forwarding.

1. A common carrier's liability does not attach to a railway company that he has contracted to move a menagerie in the latter's own cars controlled by its own agents, and though operated by railway employes, run upon a time schedule to suit the menagerie. And

a stipulation that the railway company shall not be liable for injuries to the menagerie caused by want of care in thus moving it, may be upheld.

2. A common carrier cannot refuse to carry such property as is generally carried, but it must have the right to carry it on trains made up by itself and running on its own time; it cannot be required to make up special trains on demand or drive such trains made up entirely by other persons, or of their cars.

3. A common carrier's statutory duty to receive the cars of other owners does not oblige it to move them except in their own routine, and in the ordinary course of business.

Error to Wayne. (Chambers, J.) Jan. 8–9.—Jan. 28.
Case. Defendant brings error. Reversed.

Alfred Russell for appellant.

Transportation of live stock and especially of wild animals was not a common carrier's duty at common law (Mich. South. R. R. v. McDonough 21 Mich. 165), and need not be undertaken without special terms; Gordon v. Ward 16 Mich. 363; Lake Shore etc., Ry. v. Perkins 25 Mich. 329; Levering v. Union T. & Ins. Co. 42 Mo. 88; Harvey v. T. H. & T.
254 Ry. 74 Mo. 546; Rice v. K. P. Ry. 63 Mo. 318; Clark v. Railroad 64 Mo. 441; Sturgeon v. Railroad 65 Mo. 470; A. T. Co. v. Moore 5 Mich. 368; M. C. R. R. v. Hale 6 Mich. 243; McMillan v. M. S. R. 16 Mich. 79, 109, 131; Buckley v. G. W. Ry. 18 Mich. 131; Sisson v. C. & T. R. R. Co. 14 Mich. 500; Hawkins v. G. W. R. 17 Mich. 57; a carrier may contract to labor without assuming the risk of negligence by the third persons whom he is compelled to employ; Peek v. N. Staffordshire Co. (1863) 4 B. & S. 627 El. Bl. & El. 958; M'Manus v. Lancashire Co. 4 H. & N. 334; Robinson v. G. W. Ry. Co. 35 L. J. (N. S.) 123; M'Manus v. Lancashire Co. (1859) 4 H. & N. 327; Wise v. G. W. Ry. Co. (1856) 1 H. & N. 63; Carr v. L. & Y. Co. (1852) 7 W. H. & G. 707; Bates v. G. W. Ry. (1865) 24 U. C. (Q. B.) 544; O'Rourke v. G. W. Ry. (1864) 23 id. 427; Hamilton v. G. T. Ry. id. 604; Spellinger v. G. W. Ry. (1865) 15 U. C. (C. P.) 315; Bissell v. N. Y. Cent. R. R. (1862) 25 N. Y. 442; Parsons v. Monteath 13 Barb. 353; Wells v. Nav. Co. 4 Seld. 375; Wells v. N. Y. Cent. R. R. (1862) 24 N. Y. 281; Perkins v. N. Y. Cent. R. R. id. 196; Smith v. N. Y. Cent. R. R. id. 222; See 5 Am. L. Reg. (N. S.) 460.

Don. M. Dickinson (Dickinson, Thurber & Hosmer) and Henry M. Cheever for appellee. Contracts of carriage exempting a railroad company from liability for gross negligence are invalid in Illinois; Arnold v. Railroad Company 83 Ill. 273; Hutchinson on Carriers sec. 260, and in New York the exemption is kept within the strict letter of the contract; Blair v. R. R. 66 N. Y. 313; Wescott v. Fargo 61 id. 542; Steers v. Steamship Co. 57 N. Y. 1
255 Magnin v. Dinsmore 56 id. 168; Belger v. Dinsmore 51 id. 166; Stinson v. R. R. 32 N. Y. 337; Nicholas v. R. R. 89

N. Y. 372; and see as to strict construction of any contract limiting the common law liability as insurers, Hawkins' Cases 17 Mich. 57; 18 Mich. 427; for a full, exhaustive discussion and analysis of the authorities, see Railroad Co. v. Lockwood 17 Wall. 357; 17 Fed. Rep. 905; also Jones v. Voorhees 10 Ohio 145; Graham v. Davis 4 Ohio St. 362; School Dist. v. R. R. 102 Mass, 552; Camden R. R. v. Baldauf 16 Penn. St. 67; Berry v. Cooper 28 Ga. 543; Read v. R. R. 60 Mo. 199; Camp v. Steamboat 43 Conn. 333; Davidson v. Graham 2 Ohio St. 131; Snider v. Adams Ex. Co. 63 Mo. 376; Fillebrown v. R. R. 55 Me. 462; Goldey v. R. R. 30 Penn. St. 242; Mich. R. R. v. Heaton 37 Ind. 448; Commonwealth v. R. R. 108 Mass. 7; Jacobus v. R. R. 20 Minn. 125; 12 Am. & Eng. R. R. Cases, 13, 28, 37: 6 id. 293, 589: id. 90.

Campbell, J.

Plaintiff who is a circus proprietor sued defendant as a carrier for injuries to cars and equipments, and to persons and animals caused by a collision of two trains made up of his circus cars, while in transit through Illinois. The court below held defendant to the common-law liability of a common carrier and held there was no avoiding liability by reason of a special contract under which the transportation was directed. The principal questions raised on the trial arose out of discussions concerning the nature of defendant's employment, and questions of damage. Some other points also appeared. In the view which we take of the case the former become more important, and will be first considered.

256 Plaintiff had a large circus property, including horses, wild animals, and various paraphernalia, with tents and appliances for exhibition. He owned special cars fitted up for the carriage of performers and property, in which the whole concern was moved from place to place for exhibition.

The defendant company has an organized connection, under the same name, with railways running between Detroit and St. Louis, through Indiana and Illinois. On the 25th of July, 1882, a written contract was made at St. Louis by defendant's proper agent with plaintiff to the following effect. Defendant was to furnish men and motive power to transport the circus by train of one or more divisions, consisting of twelve flat, six stock, one elephant, one baggage and three passenger coaches, being in all twenty-three cars from Cairo to Detroit with privilege of stopping for exhibition at three places named, fixing the time of starting from each place of exhibition, leaving Cairo August 19, Delphi August 21, Columbia City August 22, exhibiting at Detroit August 23, and then to be turned over to the Great Western Transfer Line boats. Plaintiff was to furnish his own cars, and two from another company at Cairo, in good condition and running order. It was agreed that "for the use of the machinery, motive power and men and the privileges above enumerated, plaintiff should pay $400 for the run to Delphi, $175 to Columbia City, and $225 to Detroit, each sum to be paid before leaving each point of departure."

257 It was further expressly stipulated that the agreement was not made with defendant as carrier, but merely "as a hirer

of said machinery, motive power, and right of way and the men to move and work the same; the same to be operated under the management, direction, orders and control of said party of the second part (plaintiff) or his agent, as in his possession, and by means of said employees as his agents, but to run according to the rules, regulations and time-tables of the said party of the first part."

The contract further provides that defendant should not be responsible for damage by want of care in the running of cars or otherwise, and for stipulated damages in case of any liability. It also provided for transporting free on its passenger trains two advertising cars and advertising material.

The plaintiff's cars were made up in two trains at Cairo, and divided to suit instructions. The testimony tended to prove that two cars were added to the forward train by order of plaintiff's agent, but in the view we take the question who did it is not important. The forward train was for some cause on which there was room for argument brought to a stand-still, and run into by the other train and considerable damage done by the collision.

Defendant insisted that plaintiff made out no case for recovery, and that the contract exempted them.

Plaintiff claimed, and the court below held the exemption incompetent.

258 Unless this undertaking was one entered into by the defendant as a common carrier, there is very little room for controversy. The price was shown to be only ten per cent. of the rates charged for carriage, and the whole arrangement was peculiar. If it was not a contract of common carriage, we need not consider how far in that character contracts of exemption from liability may extend. In our view it was in no sense a common carrier's contract, if it involved any principle of the law of carrier's at all.

The business of common carriage, while it prevents any right to refuse the carriage of property such as is generally carried, implies, especially on railroads, that the business will be done on trains made up by the carrier and running on their own time. It is never the duty of a carrier, as such, to make up special trains on demand, or to drive such trains made up entirely by other persons or by their cars. It is not important now to consider how far, except as to owners of goods in the cars forwarded, the reception of cars loaded or unloaded, involves the responsibility of carriers as to the owners of the cars as such. The duty to receive cars of other persons, when existing, is usually fixed by the railroad laws, and not by the common law. But it is not incumbent on companies in their duty as common carriers to move such cars except in their own routine. They are not obliged to accept and run them at all times and seasons, and not in the ordinary course of business.

The contract before us involves very few things ordinarily undertaken by carriers. The trains were to be made up entirely of cars which belonged to the plaintiff and which defendant neither loaded nor prepared, and into the arrangement of which, and the

259 stowing and placing of their contents the defendant had no power to meddle. The cars contained horses which were

entirely under control of the plaintiff, and which under any circumstances may involve special risks. They contained an elephant, which might very easily involve difficulty, especially in case of accident. They contained wild animals which defendant's men could not handle, and which might also become troublesome and dangerous. It has always been held that it is not incumbent on carriers to assume the burden and risks of such carriage.

The trains were not to be run at the option of the defendant, but had short routes and special stoppages, and were to be run on some part of the road chiefly during the night. They were to wait over for exhibitions, and the times were fixed with reference to these exhibitions and not to suit the defendant's convenience. There was also a divided authority, so that while defendant's men were to attend to the moving of the trains, they had nothing to do with loading and unloading cars, and had no right of access or regulation in the cars themselves.

It cannot be claimed on any legal principle that plaintiff could, as a matter of right, call upon defendant to move his trains under such circumstances and on such conditions, and if he could not, then he could only do so on such terms as defendant saw fit to accept. It was perfectly legal and proper, for the greatly reduced price, and with the risks and trouble arising out of moving peculiar cars and peculiar contents on special excursions and stoppages to stipu-
260 late for exemption from responsibility for consequences which might follow from carelessness of their servants while in this special employement. How far in the absence of contract they would be liable in such a mixed employment where plaintiff's men as well as their own had duties to perform connected with the movement and arrangement of the business we need not consider.

It is a misnomer to speak of such an arrangement as an agreement for carriag- at all. It is substantially similiar to the business of towing vessels, which has never been treated as carriage. It is, although on a larger scale, analagous to the business of furnishing horses and drivers to private carriages. Whatever may be the liability to third persons who are injured by carriages or trains, the carriage owner cannot hold the persons he employs to draw his vehicles as carriers. We had before us a case somewhat resembling this in more or less of its features in Mann v. White River Log & Booming Co. 46 Mich. 38, where it was sought to make a carrier's liability attach to log-driving, which we held was not permissible. All of these special undertakings have peculiar features of their own, but they cannot be brought within the range of common carriage.

It is therefore needless to discuss the other questions in the case, which involve several rulings open to criticism. We think the defendant was not liable in the action, and it should have been taken from the jury and a verdict ordered of no cause of action.

The judgment must be reversed and a new trial granted.

The other Justices concurred.

261 Mr. Herdman: The defendant now offers in evidence decision of the Supreme Court of Michigan in the case of Mehe-

gan vs. Boyne City, G. & A. R. Co., as reported in Volume 141 of the Northwestern Reporter on Page 905.

Mr. Mahoney: The objection of the last offer is intended to raise simply the two questions:

1. That what made up the law of Michigan is immaterial in this case, and,

2. That the decision of that court is not the proper method to prove the laws of another state.

But there is no question based upon the identification of the offer as being in fact a report of the court whose decision it purports to report.

The Court: The objection is overruled.

To which ruling of the court the plaintiff, by his counsel, excepted.

The same is received and read in evidence, a copy of which is as follows:

262 MEHEGAN

v.

BOYNE CITY, G. & A. R. Co.

(Supreme Court of Michigan. May 28, 1913.)

1. Contracts (Sec. 114#).—Legality—Limitation of Liability—Railroad.

Where a railroad company grants certain employes of a chemical company the right to operate a motor car on its railroad, it can stipulate that it shall not be liable for injuries caused by its negligence to the operators of the motor car, since that contract is not made in its capacity as common carrier.

(Ed. Note.—For other cases, see Contracts, Cent. Dig. Sec. 475; Dec. Dig. Sec. 114#.)

2. Death (Sec. 25).—Actions)—Defenses)—Release).

Under Comp. Laws, Sec. 10427, providing that where a death is caused by a negligent act, such as would give the person injured, if death had not ensued, a right of damages, the person who would have been liable, had death not ensued, shall be liable for the death, and section 10428, providing that an action for death shall be brought in the name of the personal representative of the decedent, and damages be distributed as personal property is distributed and that the jury shall give such damages as they deem just with reference to the pecuniary injury resulting from the death to the persons entitled to damages, a release executed by a decedent prior to the accident which resulted in his death, which would have been valid to prevent his recovery for injuries not resulting in death, is also valid to prevent a recovery by his representatives after his death.

263 (Ed–Note for other cases, see Death Cent. Dig., Sec. 27; Dec. Dig., Sec. 25.)

Error to Circuit Court, Otsego County; Nelson Sharpe, Judge.

Action by Lillian S. Mehegan against Boyne City, Gaylord and Alpena Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Argued before Steele, C. J., and Moore, Brook, Blair and Stone, JJ.

Harris and Ruegsegger, of Boyne City (H. Geer and H. R. Martin, both of Detroit, of counsel), for appellant. Devere Hall, of Bay City, George E. Nichols, of Iona, and H. A. Jersey, of Boyne City, of counsel for appellee.

Moore, J.

The defendant is a railroad corporation organized under the laws of Michigan. It owns and operates a railroad which extends from Boyne City to Gaylord, and has branches and spurs running from its main line. Among other things, it transports timber products from the forests along its line of road to the mills and factories in Boyne City, and is what is generally called a logging railroad.

The Boyne City Chemical Company manufactures charcoal, wood alcohol, and by-products, and chars large quantities of wood each day, a large part of which is hauled over defendant's road from the forest along its line.

In July, 1905, the said Boyne City Chemical Company became the owners of a motor car which was propelled by gasoline.
264 The chemical company desired to use it upon the tracks of the defendant for the convenience of the men in going from its plant at Boyne City out along the line of railroad for the purpose of measuring wood and performing other duties. The chemical company and the defendant railroad company thereupon entered into an agreement which bears the date July 6, 1905. Under this agreement permits were issued to one William Spratt and the deceased, James Mehegan, to ride upon this motor car, which is designated in the agreement as "Number 99."

Mehegan and Spratt, before being permitted to ride upon the motor car upon the tracks of the defendant, were required, under the terms of the contract, to execute to the defendant a release; the plaintiff in this case joining with her husband in the execution of the same, and Mrs. Spratt, the wife of William Spratt, joining with him in the execution of said release. Later, and about August, 1908, one Ralph Bearss also became a scaler for the Boyne City Chemical Company. He executed a life release, and was granted a permit to ride upon and assist in operating the said motor car upon the tracks of the defendant company. Under the terms of the agreement and after delivery of the release the deceased and Spratt, and later Bearss, continued from time to time to operate the motor car upon the tracks of the defendant company. In all train orders and train sheets, said car was known as "No. 99." Spratt, Bearss, and the deceased were men familiar with the railroad rules.

265 At a point east of the west line of Park Street, which is the east line of the passenger depot in Boyne City, a house had been constructed for the housing of this motor car. It was

situated about twenty feet north of the north rail of the main line of defendant's track, and stands partly upon a lot owned by the deceased, Mehegan, and from it extends a siding, which connects with the main line a few feet west of the west line of Boyne Avenue, the distance from the motor car house to where the siding strikes the main line being approximately 195 feet. East of Boyne Avenue, on the north side of the track, and 1,041 feet east of the motor car house, and 1,801 feet east of the depot, between the railroad track and the cooperage plant, are the steam vats of the cooperage plant, and east of the vats 739 feet is the telephone box on the south side of the railroad track above mentioned East of this telephone box a short distance is the side-track connected with the main track, known as Mill No. 3 siding, sometimes called Elm Cooperage siding, above mentioned. The steam vats are 65 feet long and lie almost parallel with the railroad track. In certain kinds of weather, with the wind in the north, northwest, or northeast, the steam from the vats along the track will at times settle down over the track so that it will obscure for perhaps 100 feet at times.

266 Many passenger and other trains arrive at and leave the station at Boyne City daily, going east and returning. Among others on February 9, 1909, was a regular passenger train scheduled to leave Boyne City at 9:05 in the morning. That morning car number 99 was in the motor car house east of the depot, and Mr. Bearss, Mr. Spratt, and plaintiff's decedent went to the motor car house for the purpose of taking the car to make a trip eastward on the tracks of the defendant. An order was obtained from the train despatcher.

Previous to 9:05 A. M. on the morning of the 19 of February, a switch engine was working in the yard, and when the morning passenger train left the depot at 9:07 and when it passed the cooperage switch, this engine was standing on the siding just off the main line. Immediately after the passenger train passed, the conductor opened the switch on the main line, the engine ran out, the switch was closed, and the engine proceeded west on the main line toward the depot. The conductor did not call up the despatcher and get permission to go out on to the main line before the engine ran out of the siding on to the main line. At this time the steam from the vats enveloped the track. Number 99, which left the motor siding switch on the main line at 9:10, was going east, following the passenger train. The steam obscured the view of the men on Number 99 of the track ahead of them, and it also obscured the view of the men on the switch engine of the track ahead of them, and Number 99 and the switch engine collided just as the switch engine emerged from the steam. Plaintiff's decedent was driving the motor car. He and Mr. Spratt occupied the front seats. Bearss,

267 who was acting as switchman, and who had opened the switch for the car to pass out, and had closed it after the car had passed out upon the main track, was standing up in the car in the rear of Mehegan and Spratt buttoning his coat. Spratt and Megegan were both killed by the collision.

Plaintiff claims that the defendant was negligent, and that its

negligence resulted in the death of her decedent; that having established a telephone at the cooperage or mill 3 switch, and having issued a bulletin that the crews of engines working on that siding should call the despatcher's office and receive orders to come out upon the main line over the switch to run to the depot before running upon the main line, it was negligence for the switching crew on this morning not to obtain such an order before coming out upon the main line, and this negligence caused the death of the plaintiff's decedent, and that the defendant is liable therefor.

The defendant contends that this collision occurred within its yard limit, and that plaintiff's decedent, who was operating the motor car, was operating it without regard to various rules of the company. The defendant further contends that even though its crew were negligent, and there was no negligence upon the part of the deceased and the others of the crew of the motor car No. 99, the plaintiff's decedent assumed the risk of operation of said motor car upon the defendant's tracks, whether the negligence which caused the
268 accident was that of the defendant or themselves, under the contract between the chemical company and the defendant and the release executed by the plaintiff, Mrs. Mehegan, and her decedent.

At the close of the plaintiff's proofs, the defendant moved for a directed verdict in its favor. The trial judge overruled the motion. The defendant did not introduce any evidence and the case was submitted to the jury. It rendered a verdict on favor of the plaintiff for $12,000. The defendant made a motion for a new trial, which was overruled by the circuit judge. The case is here by writ of error.

The defendant discusses the following propositions:

1. The place where the accident occurred was within the defendant's yard limits; and rules 91 and 93 were not in any way modified or superseded by the bulletin claimed to have been issued relative to switching crews obtaining orders over the telephone before coming out of the cooperage or mill 3 siding on to the main track.

2. Plaintiff's decedent and his associates were guilty of contributory negligence.

3. The contract between the Boyne City Chemical Company and the defendant, the Boyne City, Gaylord & Alpena Railroad Company, was valid, and the release executed by the plaintiff's decedent, James E. Mehegan, and the plaintiff herself, who was his wife, is likewise valid, and this contract and this release preclude recovery in this suit.

4. The Circuit judge should have granted the defendant's motion for a new trial.

(1) In our view of the case it will be necessary to discuss only the third of the above propositions. The material parts of the
269 contract to which reference has been made read as follows:

"Permit granting privilege by Boyne City, Gaylord & Alpena Railroad Company to the Boyne City Chemical Company to Operate a Motor Car upon Tracks of the Railroad Company.

"Whereas, the said Boyne City Chemical Company own a motor

car, and in connection with its business it is necessary that its employes visit at different points upon and along the right of way of the said railroad company; therefore;

"The said railroad company hereby grant a permit to the said chemical company for itself and certain of its employes to use said car upon the tracks of the company, subject always to the conditions and regulations hereinafter set forth as follows:

"1. This permit shall be for employes of the Boyne City Chemical Company upon business only.

"2. The Boyne City Chemical Company shall furnish to the railroad company a list of its employes to be permitted by them to operate and ride upon this car.

"3. Such employes shall give to the railroad company a full releases for all damages to themselves, their heirs and personal representatives which they shall suffer by reason of the operation of this car, whether the same be caused by the negligence of the railroad company or its employes, or by their own negligence or the negligence of the chemical company.

"4. The chemical company shall release the railroad com-
270 pany from all claim of damage to said motor car caused by its operation or storage upon any of the railroad company's tracks and grounds, whether caused by the negligence of the railroad company's employes or otherwise.

"5. The chemical company shall execute a good and sufficient bond to the railroad company in the penalty of ten thousand dollars conditioned to reimburse the railroad company for all damages it may suffer arising to its property, its employees, to third persons and their property through the storage and operation of such motor car upon the tracks and grounds of the said railroad company.

"6. Said motor car shall have painted in large distinct figures upon the front and rear of car, 'No. 99', and shall be known and designated as 'No. 99' in all communications and train orders.

* * * * * * *

"8. Owing to the weight and bulk of said motor car it will be necessary to authorize its movements over the tracks of the railroad company by train orders in the same manner as extra railroad trains are now being operated by said railroad company; therefore it shall be the duty of the chemical company employees who are authorized to operate said motor car to first obtain and use a copy of the current time tables and rules governing the operation of the railroad company's trains.

* * * * * * *

"10. The rules and regulations governing the operation of the engines and trains of the railroad company shall apply and
271 the chemical company and its employees shall be bound by them in the same manner and to the same extent as the employees of the railroad company are thereby controlled and bound.

"11. The chemical Company and its said employes before starting upon any trip with said motor car shall first obtain a train order

for such trip from the train dispatcher of the railroad company then on duty, and shall conform to all laws and ordinances of the state and municipalities relating to the operation of railroad trains as to speed, etc.

"12. The railroad company reserves the right to cancel this permit and to terminate the operation of said car upon its tracks without notice.

"Dated this 1st day of July, A. D. 1905.

"Boyne City Chemical Company, through its president and treasurer, hereby accepts the above permit, and agrees that said chemical company shall be bound thereby.

"Dated this 6th day of July, A. D. 1905.

The release heretofore referred to reads as follows:

BOYNE CITY, MICH., July 15, 1905.

"In consideration of my being permitted to ride upon the motor car of the Boyne City Chemical Company upon the tracks of the Boyne City, Gaylord & Alpena Railroad Company, I hereby stipulate with the Boyne City, Gaylord & Alpena Railroad Company, that I am in the employ of the Boyne City Chemical Company, and that I hereby release the said Boyne City, Gaylord & Alpena Railroad Company from any and all liability for any damage or injury which I may receive while riding upon or operating the
272 said motor car of the Boyne City Chemical Company upon the tracks of the said railroad company, both as to any right of action that may accrue to myself, my heirs and personal representatives. I further stipulate and agree while operating or riding upon said motor cars to be bound by all orders, rules and regulations of the said railroad company.

W. T. SPRATT.
"MRS. WM. SPRATT.
"JAMES E. MEHEGAN.
"MRS. JAMES E. MEHEGAN.

In the presence of

"GLADYS SPRATT.
"MRS. WM. DOW."

It is the claim of the plaintiff that the defendant had no right under the powers conferred upon it to enter into such a contract as was made here. No case is cited by counsel upon either side that is upon all fours, but there is a line of cases which establishes a principle which we think is applicable here.

Before calling attention to these cases a further statement of the situation disclosed by the record will be profitable.

The Boyne City Chemical Company carried on a manufacturing business at Boyne City. It uses large quantities of wood in its manufacturing business, about 5,000 cords a month which is shipped to its plant at Boyne City over the defendant's road. In connection with the cutting and shipping of this wood, it is necessary

for certain employes to visit different points along the defendant's line of road for the purpose of buying wood, and measuring wood, superintending the loading of it on cars, and looking after
273 it in general in the woods. The employees who did this work at the time of the accident lived at Boyne City. Before the contract was made in July, 1905, these employees used to drive teams to and from their work. Frequently when they drove it took until nearly noon for them to get to their work, and sometimes they were away at camp two or three days at a time, and, in order that they might be at home more, it was decided to use the motor car. With it they were enabled to go to their work in the morning and get back at night, except when they went to Gaylord.

It will be seen that it was an advantage to all the parties to bring about the result which was attempted to be reached by the use of the motor car. The men were able to spend more time with their families at home. Less time was spent upon the road, so that more effective work was done for the chemical company at the same wage, and more freight for the railway company would also result by the expenditure by the men of the same amount of time.

The record discloses that the use of their motor car by the chemical company, through its employees, upon the tracks of the defendant railroad company did not interfere with the performance by the defendant of its corporate duties to the public. It did not lessen the number of trains or materially interfere with the freight or passenger traffic except possibly to increase the former, while at the same time the officers of the defendant road did not
274 relinquish the right to control the movements of the motor car.

In Coup v. Ry. Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 347, which was a suit for damages on account of injuries to a circus which had been carried under a special contract, it was held that the railway company was not a common carrier of circuses, and, therefore, that the contract which exempted it from liability was valid. Justice Campbell, speaking for the court, said:

"Unless this undertaking was one entered into by the defendant as a common carrier, there is very little room for controversy. The price was shown to be only ten per cent of the rates charged for carriage, and the whole arrangement was peculiar. If it was not a contract of common carriage, we need not consider how far in that character contracts of exemption from liability may extend. In our view it was in no sense a common carrier's contract, if it involved any principle of the law of carriers at all. The business of common carriage, while it prevents any right to refuse the carriage of property such as is generally carried, implies, especially on railroads, that the business will be done on trains made up by the carrier and

* * * * * * *

It cannot be claimed on any legal principle that plaintiff could, as a matter of right, call upon defendant to move his trains under such circumstances and on such conditions, and if he could not, then he could only do so on such terms as defendant saw fit to

accept. It was perfectly legal and proper, for the greatly reduced price, and with the risks and trouble arising out of moving peculiar cars and peculiar contents on special excursions and stoppages, to stipulate for exemption from responsibility for conse-
275 quences which might follow from carelessness of their servants while in this special employment."

In Clough v. G. T. W. Ry Co., 155 Fed. 81, 85 C. C. A. 1, 11 L. R. A. (N. S.) 446, it was said: "That the railway company was under no common law obligation to move the circus company over its line in the manner it was being transported at the time of the injury to the plaintiff in error must be conceded. If the railway company was under no statutory or common-law obligation to render the special service it was called upon to render there were no reasons of public policy which forbade the rendition of such service upon such terms as the parties might stipulate. The right to make special stipulation under such conditions has been recognized and applied in a number of cases substantially like the case at bar when circus trains were hauled under special agreements relieving the company from carrier's liability." See same case in 212 U. S. 579, 29 Sup. Ct. 688, 53 L. Ed. 659; also Forepaugh v. Delaware, etc., R. Co., 128 Pa. 217, 18 Atl. 503, 5L R. A. 508, 15 Am. St. Rep. 672; Robertson v. Old Colony R. Co., 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482; Chicago, etc., Ry. Co. v. Wallace, 66 Fed. 506, 14 C. C. A. 257, 301 R. A. 161; Wilson v. Atlantic, etc., R. Co. (C. C.) 129 Fed. 774; and 2 Elliott on Railroads, sec. 451; Cleveland, etc., Ry. Co. v. Henry 170 Ind. 94, 83 N. E. 710 which indicate that special contracts exempting railroad companies from liability are valid.

276 There are many other cases cited to the same effect in the briefs of counsel for defendants.

(2) It is said by counsel for plaintiff that the contracts and release cannot take away the rights of Mrs. Mehegan and her child. In one of the briefs it is said: "These sections (referring to the statute) give Mrs. Mehegan and the infant a right of action not possessed by decedent in his life-time but one arising from his death. As applied here, the right is one in no manner accruing to decedent as it did not begin until his life terminated. He could not release that which he never possessed."

In the other brief it is stated this way.

"It also may be conceded under the circumstances of this case, had deceased been injured, he could not have recovered from the railroad company. Having released the company from all liability for injuries that might befall him through its negligence he could not be allowed to recover from it in the face of this release. The proposition is not admitted and the concession is only made for the purpose of the argument."

" 'The 'death act,' C. L. Sec. 10427, provides that there can be no recovery under the statute only when the party injured would have been entitled to recover, if death had not ensued. It might seem, upon first thought, that since Mehegan could not have recovered had he been injured, then of course there can be no recovery under the

statutes for his death, but this is not the logical conclusion when the statute appears in the full light of its true construction."

277 "The true construction of this statute must be that it was intended that the liability of the person or corporation causing the death of the deceased should be determined by the same state of facts and the same degree of evidence that would determine liability toward the deceased for any injuries he might have sustained. If the company, under the facts, was liable to the injured had he lived, then, under the same state of facts it was liable to his wife and children for his death. In other words, the statute, it seems to me, was intended to bar a recovery only when the state of facts applicable to the primary right of action was such as to bar recovery, and did not intend that the right the statute gave to a wife and her children, expressly and purposely for their maintenance, their pecuniary damage, should be defeated by any affirmative defense such as a release, or waiver, or compromise. To follow such a construction would be to take from the wife and children the cloak thrown around them for their protection and place it upon the shoulders of the husband and father, to barter it away as he thought fit."

"The right given under the statute in no way inures to the benefit of the deceased; it is not even in existence, only as an inchoate right in the wife and children, until after his death; damages recovered under the statute belong not to his estate, but to those pecuniarily dependent upon him; he can have no pecuniary interest growing out of his own death; under no version of the statute has he even the remotest interest in any damages recovered for his death, and

278 having no such interest, it follows that he cannot, by any manner of contract, defeat a recovery under the statute."

In view of these contentions so ingeniously and ably urged it is important to refer to the statute. It reads as follows:

"C. L. Sec. 10427. Sec. 1. Whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages in respect thereof, then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"C. L. Sec. 10428. Sec. 2. Every such action shall be brought by, and in the names of, the personal representatives of such deceased person, and the amount recovered in every such action, shall be distributed to the persons and in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered."

279 These provisions of the statute have been before this court several times. Sweetland v. Railway Co., 117 Mich. 239, 75,

N. W. 1066, 43 L. R. A. 568; Dolson v. Railway Co., 128 Mich. 444, 87 N. W. 629; Ingersoll v. Ry. Co., 163 Mich. 268, 128 N. W. 227, 32 L. R. A. (N. S.) 362; Verlinde v. Railroad Co., 165 Mich. 371, 130 N. W. 317; Habits v. Railroad Co., 170 Mich. 71, 135 N. W. 827.

A reference to the opinion filed in those cases will show a great diversity of views on the part of the justices as to the construction the statute should have. It is however, now established as the law in this state that the statute does not provide for two separate and distinct causes of action.

The following cases are instructive:

In Brown v. Railway Co., 101 Tenn. 252, 47 N. W. 415, 70 Am. St. Rep. 666, it was held that an adjustment by deceased, in his lifetime, of his claim for damages for personal injuries barred an action by his widow to recover for his death resulting from such injury.

In Telephone & Telegraph Company v. Cassin, 111 Ga., 575, 36 S. E. 881, 50 L. R. A. 694, the plaintiff's decedent had been injured through the negligence of the Telephone & Telegraph Company, and had instituted suit, and while the suit was pending had settled with the company, and executed a release of his claim. Later he died, and his widow brought suit against the company, under the death act of Georgia, claiming that the release executed by
280 him was not binding upon her. Held, that she was bound by the release, and that she could not maintain the suit. The court was composed of six judges and two of them dissented from the majority opinion. The majority opinion contains a very exhaustive discussion of the authorities on the question. In the course of the majority opinion it is said:

"But it is said that no decision that a release by the husband bars a subsequent suit by or for the wife is of any value in this case unless it was rendered by a court which holds that the survival and death acts create new and distinct causes of action. This, therefore, must be borne in mind in estimating the weight of the authority cited. In reading them, with this prominently in view, it is remarkable to note the various expressions used in the effort to define the relation which the action by or for the widow bears to the action in favor of the injured husband. Some, in fact all, of the courts may be said to call it a new cause of action, as in W. & A. R. R. v. Bass, 104 Ga. 390 (30 S. E. 874). Some call it a 'new but not an independent cause of action,' Cooley on Torts 264, speaks of it as an 'enlargement' or 'continuation.' * * * Others say 'the cause of action for the homicide is "contingent" on the death of the injured party without having satisfied his claim for damages.' But notwithstanding this variety of expressions, there is a substantial unity in holding that a release by the husband bars the wife; this view being taken even by these courts which insist most strongly that the two acts create two causes of action, and by courts also which rule that concurrent
281 suits may be maintained. However new it may be, in the very nature of things it cannot be independent; it is inherently rooted and grounded in the injury to the husband. It grows out of it, and is a part of it, having almost complete identity of substance, and subject to the same defenses. More than a dozen courts

have directly passed upon the effect of release by the husband, and all except those of Massachusetts and Kentucky have held that it bars suit after death."

After discussing the cases which it was claimed supported the right of the widow to maintain the action, the court in majority opinion, said:

"We think the cases above cited are the very strongest which can be found in favor of the position taken by the defendant in error. It will be seen that they are based either upon penal statutes or upon decisions which have been overruled, or that they are discussing the effect of concurrent remedies after the death of the injured party, or that the decisions themselves have been weakened by conflicting decisions in the same jurisdictions."

It was further said in the majority opinion:

"If the wife is in privity with her husband, it is conceded that his settlement will bind her; but if there is no privity between them as to this class of cases, then of the husband should sue and fail to recover, the wife, after his death, would not be bound by that judgment; she may bring suit and obtain a verdict, notwithstanding the husband failed in his suit. So that not only is a settlement no
282 bar, but neither is a verdict against the husband a bar. This would only make the statutes penal, but it would not allow the defendant to buy his peace by paying money, nor could he secure peace by making a successful defense immediately after the injury, when the recollection of the witnesses is fresh, when they are all accessible, and when the circumstances of the injury can be most certainly and truthfully portrayed." * * *.

"The settlement also operates as a bar upon considerations of public policy, interposing a statute of repose; for, if the settlement is not a bar, there is practically no statute of limitations, and oftimes no person with whom the defendant can settle, and even after the settlement, marriage, births and after-born children, death of the wife, minority of the children, and the possibility that the children themselves m-y die during the lifetime of the injured party, all make the defendant liable to an uncertain extent as of an uncertain date, to unknown and unknowable persons. In the nature of things, one who claims as a wife is bound by the husband's conduct. His freedom from fault inures to her benefit, but his negligence is imputed to her, when, as a quasi-substituted plaintiff, she asks the court to investigate the circumstances of his killing. If his negligence in the act is imputed to her, should not also his conduct after the injury be imputed to her? In spite of all the recent statutes 'the husband is still the head of the family,' his life is his own, his body is his
283 own, and whatever right in that life the law gives to his wife must be subject to the superior right of the husband. While the law gives her the full value of that life, she takes it as he left *left* it. If it was a valuable life, in a pecuniary sense, if his health, his strength, his habits, were such as to give it a great earning capacity, then great is her recovery. But if, on the contrary, he had so lived as to lessen these elements of pecuniary value, if by idleness and vice

and dissipation he had shorn himself of his strength, the wife's right therein must be taken burdened by what he has done in his lifetime. While he lived, his life and his person belonged to himself, and he must use that life and body for the support of his family. He must be left free when injured, to settle for the wrongs which were done to him, and to him alone; he must be at liberty to adjust that wrong without the amount of his settlement being diminished by the possibility, or probability that the person dealing with him will have to pay a second time for the same act. The family stand to him in the relation of heirs, and like all heirs have no rights which can interfere with those of the living. They take what he leaves; they take under him and subject to him, and not adversely to him. Under this statute, the cause of action primarily grows out of the relation between the husband and the wrong-doer and his rights against the wrong-doer. The full value of action is in him; only secondarily is it in the wife, and if it come to her, if it comes at all, burdened and incumbered by his conduct, his settlement, and whatever else he did in his lifetime, in reference thereto. It is true she may
284 recover the full value of his life, but that value depends on what he was, and what he did in his lifetime, and if before his death he has settled with the defendant, he has, by his own act, transmuted the value of a cause of action into dollars and cents, and deprived his family of any further value growing out of the negligence complained of. * * *

The contention of the defendant in error means that if a settlement takes place, the defendant may be called upon to pay a second time in case of death. It means double damages. It means the statute is to be treated as penal and not compensatory. It means that we are to lay at the door of our statute the reproach which was so often and so justly uttered against the statutes of some of the other states, as to which it was said that it was actually 'cheaper to kill than to hurt'. With us, hereafter it would mean the same thing, because for the death of the husband there would only be one recovery. For his injury and subsequent death there could be two recoveries. We have seen the statutes identical with ours in substance, having the same object in view, and intended to give the same rights, have all, or very near all, been construed to mean that where the husband was injured and subsequently settled for the injury, and thereafter died from the effect of the injury, there could by no recovery by his wife for his death. She stands in his shoes. She recovers if he could have recovered. She fails, if for any
285 reason, he would have failed. If he consented to the injury she cannot recover. If he ratifies the injury by accepting compensation, she cannot recover. If by ordinary care he could have avoided the injury, she cannot recover. If he obtains a judgment against the defendant, she cannot recover. What would have estopped him estops her. Not only would it be a hardship to require defendant to pay double damages, but there are considerations of public policy which cry out against such construction, a public policy so pronounced that it would require every reasonable doubt to be resolved in its favor. If the defendant is to pay the man full

damages, and subsequently is to pay the full value of his life, it becomes manifest that settlements are impossible. It would operate to deprive the injured party of the power of settling his claim or realizing anything from it in his lifetime. It would naturally, if not inevitably, prevent settlements, and procrastinate litigation, until it could be determined whether death would ensue from the injury. There could be little inducement to settle without suit, because whatever might be paid to the injured party would neither bar nor diminish the claim of the representative should death ensue. The statutes should not be strained to bring about such a result, nor should it be reached unless required by the plain language of the enactment.' Littlewood v. Mayor, 89 N. Y. 24, 42 Am. Rep. 276, 277. Under such a construction the law, by its own act, would encourage litigation in spite of the maxim that 'it is to the 286 interest of the commonwealth that there should be an end of litigation.' It would make it impossible to obey the injunction, 'Agree with thine adversary quickly while thou art in the way with him,' for the defendant can properly ask, 'Who is mine adversary?' He might be able to settle, he may have agreed on terms, and yet he would be compelled to say to a husband and father, 'It is impossible to say whether you will die as a result of these injuries or not, or whether, when you die, your wife and your children will then be living or not, or whether you will be wifeless and childless. She may consent to the settlement, but she may also die, and you may marry again. Or, the wife may die and leave you children. It is impossible to settle with them, because they are minors, and even if that were legally possible, there may be afterborn children, and all these uncertainties must be considered in our negotiations.' Surely the law does not intend that any case shall be so inchoate that person liable does not know to whom he may be ultimately liable, and cannot adjust and settle, even when he admits liability, and is willing to pay."

There are many other authorities cited in the brief of appellant to the same effect.

It is urged by counsel for plaintiff that Ingersoll v. Railway Company, 163 Mich. 268, 128 N. W. 227, 32 L. R. A. (N. S.) 362, sustains their contention.

287 A reference to the case will show that the effect of a release by the husband either before or after a cause of action would have otherwise arisen was not involved.

The language of the statute suggests very clearly that if the husband would not have a cause of action had he survived the injuries that his widow and child would not have one. It is clear from the record that the chemical company, the defendant company, and the employes of the chemical company recognized that defendant company could not be compelled to permit the use of this motor car upon its tracks. It is also clear they thought it would be to their mutual advantage to permit its use. The defendant company was willing to enter into the arrangement if it could do so freed from all liability. To bring about the use of the motor the chemical company and the employes were willing to free the defendant company of liability.

A reading of the contract and release shows that the parties thought they were accomplishing this result. We can see nothing illegal or contrary to public policy in what the parties undertook to do.

The judgment is reversed. No new trial will be granted.

BLAIR, J., who sat at the hearing is now dead.

288 Mr. Herdman: The defendant now offers in evidence decision of the Supreme Court of the United States in the case of Baltimore and Ohio Southwestern Railway Company v. Voigt, as reported in Volume 17 of the Official Reports of the Decisions of the Supreme Court of the United States, on pages 498 to 521 inclusive of said volume.

Mr. Mahoney: The offer is objected to as immaterial in that the decision of the United States Supreme Court on the question of common law as in that court is immaterial in this case, and incompetent, and that the decisions of that court are not the proper methods of proving the laws of the United States. There being no objection on the ground of identification of the offer as to its being in fact a correct report of the decisions of the United States Supreme Court.

The Court: The objection is overruled.

To which ruling of the court the plaintiff, by his counsel, excepted.

The same is received in evidence, a copy of which is as follows:

289 BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY

v.

VOIGT.

Certificates from the Circuit Court of Appeals for the Sixth Circuit.

No. 88. Argued December 20, 21, 1899. Decided February 26, 1900.

The railway company, being engaged as a common carrier in the business of transporting passengers and freight for hire, entered into a contract in writing with an express company authorized by law to do and actually doing business known as express business, by which contract the railroad company agreed, solely upon the considerations and terms hereinafter mentioned, to furnish for the exclusive use of such express company, in the conduct of its said express business over said railway company's lines, certain privileges, facilities and express cars to be used and employed exclusively by said express company in the conduct of such express business; and to transport said cars and contents, consisting of express matter, in its fast passenger trains, together with one or more persons in charge of said express matter, known as express messengers, for that purpose to be allowed to ride in said express cars; to transport such mes-

sengers for the purposes and under the circumstances aforesaid free of charge. And by said contract it was agreed on the part of said express company to pay said railroad company for such privileges and facilities and for the furnishing and use of said express car or cars, and for such transportation thereof, a compensation named in said contract; and by which contract it was further agreed by the express company to protect the railroad company and hold it harmless from all liability it might be under to employes of the express company for any injuries sustained by them while
290 being so transported by said railroad company, whether the injuries were caused by negligence of the railroad company or its employes or otherwise. Voigt made application to said express company in writing to be employed by it as express messenger on the railroad of a company between which and such express company a contract as aforesaid existed, and such applicant, pursuant to his application, was employed by the express company under a contract in writing signed by him and it, whereby it was agreed between him and the express company that he did assume the risk of all accident or injury he might sustain in the course of said employment whether occasioned by negligence or otherwise, and did undertake and agree to indemnify and hold harmless said express company from any and — claims that might be made against it arising out of any claim or recovery on his part for any damages sustained by him by reason of any injury, whether such damages resulted from negligence or otherwise, and to pay said express company on demand any sum which it might be compelled to pay in consequence of any such claim, and to execute and deliver to said railroad company a good and sufficient release under his hand and seal of all claims and demands and causes of action arising out of or in any manner connected with said employment, and expressly ratified the agreement aforesaid between said express company and said railroad company. Held, that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of the Railroad Company v. Lockwood, 17 Wall,
291 357; that he was not constrained to enter into the contract whereby the railroad Company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger; and that such a contract did not contravene public policy.

The following statement and question were certified to this court by the Judges of the Circuit Court of Appeals for the Sixth District:

"This was an action brought by William Viogt, the defendant in error, against the Baltimore and Ohio Southwestern Railway Company, the plaintiff in error, to recover for damages sustained by him in consequence of a collision between two trains of the plaintiff in error, upon one of which, a fast passenger train, he was riding at the time of the accident. He was an express messenger riding in a car which was set apart for the use of the United States Express Company, and occupied by that company for its purpose under a contract between the express company and the railway company.

The plaintiff alleged in his petition that he was traveling as a passenger for hire on one of the defendant's trains, being an express messenger on said train. In fact, he was upon said train only by virtue of his employment as express messenger of his company and the above mentioned contract between his company and the railway company. The answer of the railway company set up two
292 grounds for defense. The first admitted that Voigt was an express messenger on its train, but denied that he was traveling as a passenger for hire. The railway company also admitted that on the occasion of the injury complained of, the train on which he was riding came into collision with another of its trains, and that in the collision Voigt sustained injuries. The second ground of defence, inasmuch as it sets out the specific matter in controversy, is here set forth in detail:

For a second and separate defence the railway company answered that on the day in question it was, and had for a long time prior there to been, a corporation under the laws of Ohio engaged in the operation of its railroad from Cincinnati to St. Louis and other places, and was so engaged at the time of the collision referred to, and that on the 1st day of March, 1895, it entered into a contract with the United States Express Company, a joint stock company duly authorized by law to carry on the express business and to enter into such contract, and that by said contract it was agreed between the express company and the railway company, among other things, that the railway company would furnish for the express company, on the railway company's line between Cincinnati and St. Louis, cars adapted to the carriage of such express matter as the express company desired to have transported over said line, and that it was part of said contract that one or more employes of said express company should accompany said goods in said cars over the said
293 line of said railroad, and for such purpose should be transported in said cars free of charge; and that it was further provided in said contract that the express company should protect the railway company and hold it harmless from all liability the railway company might be under to employes of the express company for injury they might sustain while being transported by the railway company over its line for the purpose aforesaid, whether the injuries were caused by the negligence of the railway company or its employes or otherwise. The railway company further averred that, pursuant to said contract with the express company, it placed upon its line of railroad for said express company certain cars known as express cars, and that it was hauling one of said cars on one of its trains on the 30th of December, 1895, at the time said collision occurred, and that prior to the time of the accident Voigt had made application to the express company in writing for employment by it as an express messenger, and that in pursuance to said application he was, prior to and at the time of the collision, employed by the express company under a contract in writing between him and it, by the terms whereof he did assume the risk of all accidents and injuries that he might sustain in the course of his said employment, whether occasioned by negligence and whether resulting in death

or otherwise, and did undertake and agree to indemnify and hold harmless the said express company from any and all claims that might be made against it arising out of any claim or recovery on his part for any damages sustained by him by reason of any injury, whether such injury resulted from negligence or otherwise, and did agree to pay to *to* said express company on demand any sum
294 which it might be compelled to pay in consequence of any such claim, and did agree to execute and deliver to the corporation operating the transportation line (in this instance the railway company), upon which he might be injured, a good and sufficient release under his hand and seal of all claims, demands and causes of action arising out of any such injury or connected with or resulting therefrom, and did ratify all agreements made by the express company with any transportation line (in this instance said railway company), in which said express company had agreed or might agree that the employes of said express company should have no cause of action for injuries sustained in the course of their employment upon the line of such transportation company; and that the said Voigt did further agree to be bound by each and every of the agreements above mentioned as fully as if he were a party thereto. He did agree that his contract with the express company should inure to the benefit of any corporation upon whose line said express company should forward merchandise (in this instance the said railway company), as fully and completely as if made directly with the corporation. In said defence it was further set forth that at the time the plaintiff sustained the injuries for which the suit was brought he was in an express car being transported by the railway company over its line from Cincinnati to St. Louis, pursuant to said contract between said express company and the railway company and that said Voigt was at the time of the collision upon said cars in pursuance to his contract with said express company and not otherwise.'

295 "To this second defence a demurrer was interposed by Voigt on the ground that the allegations therein did not constitute a defence to the action. Upon the hearing of this demurrer it was sustained, and an entry was made of record finding the demurrer well taken. The opinion of the court sustaining the demurrer is published in 79 Fed. Rep. 560. The decision of the court went upon the ground that although Voigt was an express messenger riding upon an express car in the circumstances stated, he was a passenger for hire and entitled to the rights accorded by law to ordinary passengers traveling by a train of a common carrier, and further that it was not competent for the railway company to absolve itself from the duties which rest upon a common carrier in reference to its passengers. A stipulation in writing was filed waiving a trial by jury, and the case was tried by the court. The finding of the issues was in favor of the plaintiff and the damages were assessed at the sum of $6,000.00, and judgment was thereupon entered that the plaintiff recover that sum with costs. The defendant brings the case here on writ of error, and assigns errors, the substance of which is involved in the ruling of the court below sustaining the demurrer

to the second defence of the answer of the defendant, and the controversy here involves the question whether in point of law a messenger of an express company, occupying a car of a railway company assigned to an express company for the prosecution of its business under a contract fixing the relations of the railway company and the express company, which, for the consideration shown by
296 the contract, absolves the railway company from the consequence of its negligence to the express company and its employes, and to which the employe agrees, upon entering the service of the express company, stands in the ordinary relation of a common carrier of passengers for hire to the employe of the express company. The rule is undoubtedly well settled that a railway company standing in the relation of a common carrier to a passenger for hire cannot absolve itself for liability from the consequences of its negligence in carriage, but the members of the court are in doubt whether the defendant in error comes within the rule above mentioned, and, therefore, upon the foregoing statement of fact it is ordered that the following question be certified to the Supreme Court of the United States for its instruction:

"Question."

"A railroad company, engaged as common carrier in the business of transporting passengers and freight for hire, entered into a contract in writing with an express company authorized by law to do and actually doing the business known as express business, by which contract the railroad company agreed, solely upon the considerations and terms hereinafter mentioned, to furnish for the exclusive use of such express company, in the conduct of its said express company business over said railway company's lines, certain privileges, facilities and express cars to be used and employed exclusively
297 by said express company in the conduct of such express business; and to transport said cars and contents, consisting of express matter, in its fast passenger trains, together with one or more persons in charge of said express matter, known as express messengers, for that purpose to be allowed to ride in said express cars; to transport such express messengers for the purpose and under the circumstances aforesaid free of charge. And by said contract it was agreed on the part of said express company to pay said railroad company for such privileges and facilities and for the furnishing and use of said express car or cars, and for such transportation thereof, a compensation named in said contract; and by which contract it was further agreed by the express company to protect the railroad company and hold it harmless from all liability it might be under to employes of the express company for any injuries sustained by them while being so transported by said railroad company, whether the injuries were caused by negligence of the railroad company or its employes or otherwise. A person made application to said express company in writing to be employed by it as express messenger on the railroad of a company, between which and such express company a contract as aforesaid existed, and such applicant, pursuant to the application aforesaid, was employed by said express company under

a contract in writing signed by him and it, whereby it was agreed between him and such express company that he did assume the risk of all accident or injury he might sustain in the course of
298 said employment, whether occasioned by negligence or otherwise, and did undertake and agree to indemnify and hold harmless said express company from any and all claims that might be made against it arising out of any claim or recovery on his part for any damages sustained by him by reason of any injury, whether such damage resulted from negligence or otherwise, and to pay said express company on demand any sum which it might be compelled to pay in consequence of any such claim, and to execute and deliver to said railroad company a good and sufficient release under his hand and seal of all claims and demands and causes of action arising out or in any manner connected with said employment, and expressly ratified the agreement aforesaid between said express company and said railroad company.

"Does said railroad company assume, toward such express messenger while being carried in the course of his said employment in one of said express cars attached to a passenger train of said railroad company, pursuant to the contracts aforesaid, the ordinary liability of a carrier of passengers for hire so as to render said railroad company liable as such to said express messenger, notwithstanding the contracts aforesaid, for injuries he might sustain by reason of a collision between the train to which said express car is attached and another train by said railroad company, caused by the negligence of employes of the railroad company?"

299 Mr. Edward Colston for plaintiff in error. Mr. Judson Harmon, Mr. A. W. Goldsmith and Mr. George Hadley, Jr., were on his brief.

Mr. Charles M. Cist for defendant in error. Mr. Edgar W. Cist was on the brief.

Mr. Justice SHIRAS, after stating the case, delivered the opinion of the court.

The question we are asked to answer is, whether William Voigt, the defendant in error, can avoid his agree- — that the railroad company should not be responsible to him for injuries received while occupying an express car as a messenger, in the manner and circumstances heretofore stated, by invoking that principle of public policy which has been held to forbid a common carrier of passengers for hire to contract against responsibility for negligence?

The circuit judge though- the case could not be distinguished from the case of Railroad Co. v. Lockwood, 17 Wall., 357, where a recover was maintained by a drover injured whilst traveling on a stock train of the New York Central Railroad Company proceeding from Buffalo to Albany, on a pass which certified that he had shipped sufficient stock to give him a right to pass free to Albany, but which provided that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. This court held that a drover traveling on a pass, for the purpose

of taking care of his stock on the train, is a passenger for
300 hire, and that it is not lawful for a common carrier of such passenger to stipulate for exemption from responsibility for the negligence of himself or his servants. This case has been frequently followed, and it may be regarded as establishing a settled rule of policy. Railway Co. v. Stevens, 95 U. S., 655; Liverpool Steam Co. v. Phœnix Ins. Co., 129 U. S., 397.

The principles declared in those cases are salutary, and we have no disposition to depart from them. At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important functions of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare. It was well said by Sir George Jessel, M. R., in Printing &c. Co. v. Sampson, L. R. 19 Eq., 465: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public
301 policy to consider—that you are not lightly to interfere with this freedom of contract."

Upon what principle, then, did the cases relied on proceed, and are they applicable to the present one? They were mainly two. First, the importance which the law justly attaches to human life and personal safety, and which therefore forbids the relaxation of care in the transportation of passengers which might be occasioned by stipulations relieving the carrier from responsibility. This principle was thus stated by Mr. Justice Bradley in the opinion of the court in the case of Railroad Co. v. Lockwood: "In regulating the public establishment of common carriers, the gr-at object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence the common law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other, it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put aside the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms."

302 The second fundamental proposition relied on to nullify contracts to relieve common carriers from liability for losses

or injuries caused by their negligence is based on the position of advantage which is possessed by companies exercising the business of common carriers over those who are compelled to deal with them. And again we may properly quote a passage from the opinion in the Lockwood case as a forcible statement of the situation:

"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier may present; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business. * * * If the customer had any real freedom of choice, if he had a reasonable or practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is almost concentrated in a few powerful corporations, whose position in *in* the body
303 politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse, to say the least, to the dictates of public policy and morality."

Upon these principles we think the law of to-day may be fairly stated as follows: 1. That exemptions claimed by carriers must be reasonable and just, otherwise they will be regarded as extorted from the customers by duress of circumstances, and therefor- not binding. 2. That all attempts of carriers, by general notices or special contracts, to escape from liability for losses to shippers, or injuries to passengers, resulting from want of care or faithfulness, cannot be regarded as reasonable and just, but as contrary to a sound public policy, and therefore invalid.

But are these principles, well considered and useful as they are, decisive of, or indeed applicable to, the facts presented for judgment in the present case?

We have here to consider not the case of an individual shipper or passenger, dealing, at a disadvantage, with a powerful corporation, but that of a permanent arrangement between two corporations embracing within its sphere of operation a large part of the transportation business of the entire country. We need not in this inquiry, examine the nature of the business of any express
304 company, or rehearse the particular services it renders the public. That has been done, sufficiently for our present purpose, in the Express cases, 117 U. S., 1, and from the opinion in that case we shall make some pertinent extracts:

"The express business has grown to an enormous size, and is carried on all over the United States and in Canada, and has been extended to Europe and the West Indies. It has become a public necessity, and ranks in importance with the mails and the telegraph. It employs for the purpose of transportation all the important railroads in the United States, and a new road is rarely opened to the public without being equipped in some form with express facilities. It is used in almost every conceivable way, and for almost every conceivable purpose, by the people and by the Government. All have become accustomed to it, and it cannot be taken away without breaking up many of the long settled habits of business and interfering materially with the conveniences of social life.

* * * * * * *

"When the business began, railroads were in their infancy. They were few in number and for comparatively short distances. There has never been a time, however, since the express business was started that it has not been encouraged by the railroad companies, and it is no doubt true that no railroad company in the United States has ever refused to transport express matter for the public, upon the application of some express company, of some form of legal constitution. Every railway company has recognized the right of
305 the public to demand transportation by the railway facilities which the public has permitted to be created of that class of matter which is known as express matter. Express companies undoubtedly have invested their capital and built up their business in the hope and expectation of securing and keeping for themselves such railway facilities as they needed, and railroad companies have likewise relied upon the express business as one of their important sources of income.

"But it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers. On the contrary, it has been shown, and in fact it was conceded upon the argument, that, down to the time of bringing these suits, no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and duties of the respective parties were carefully fixed and defined. These contracts, as is shown by those in this record, very necessarily in their details, according to the varying circumstances of each particular case, and according to the judgment and discretion of the parties immediately concerned. It also appears that, with very few exceptions, only one express company has been allowed by a railroad company to do business on its road at the same time.

306 "The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As

the things carried are to be kept in the personal custody of the messenger or other employe of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is 'express,' it implies access to the train for loading at the latest, and for unloading at the earliest convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both personal and — property. Passenger trains have, from the beginning, been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger. The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of the passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a
307 business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve another express company in the same way, and still perform its other obligations to the public in a satisfactory manner. The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allot-ed to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space the railroad company can well allow for the business. * * *

"In this way three or four important and influential companies were able substantially to control, from 1854 until about the time of the bringing of these suits, all the railway express business in the United States, except upon the Pacific roads and in certain comparatively limited localities. In fact, as is stated in the argument for the express companies, the Adams was occupying, when these suits were brought, one hundred and fifty-five railroads, with a mileage of 21,216 miles; the American, two hundred roads, with a mileage of 26,000 miles; and the Southern, ninety-five roads with a mileage of 10,000 miles. Through their business arrange-
308 ments with each other and with other connecting lines, they have been able for a long time to receive and contract for the delivery of any package committed to their charge at almost any place of importance in the United States and in Canada, and even at some places in Europe and the West Indies. They have invested

185

millions of dollars in their business, and have secured public confidence to such a degree that they — trusted unhesitatingly by all who need their services. The good will of their business is of very great value if they can keep their present facilities for transportation. The longer their lines and the more favorable their connections, the greater will be their profits, and the better their means of serving the public. In making their investments and in extending their business they have undoubtedly relied on securing and keeping favorable railroad transportation, and in this way they were encouraged by the apparent willingness of railroad companies to accommodate them; but the fact still remains that they have never been allowed to do business on any road except under a special contract, and that as a rule only one express company has been admitted on a road at the same time."

The cases in which the opinion from which the foregoing extracts are taken were suits brought by certain express companies which had been doing business on certain railroads, under special contracts between the respective companies, to compel the railroad companies to permit them to continue business on the roads on terms to be fixed by the courts; in other words, to demand as a
309 right what they had heretofore enjoyed by permission of special contracts. This the court declined to do, and directed the bills to be dismissed.

Our citations have been intended partly to disclose, in a succinct form, the nature of the express business, but more particularly to show that, in essence the express business is one that requires the participation of both the companies on terms agreed upon in special contracts, thus creating, to a certain extent, a sort of partnership relation between them in carrying on a common carrier business.

We are not furnished in this record with an entire copy of the contract between the plaintiff in error, The Baltimore and Ohio Southwestern Railway Company, and The United States Express Company, but it is sufficiently disclosed in the statement made by the Judges of the Circuit Court of Appeals, that the companies were doing an express business together as common carriers under an agreement entered into on March 1, 1895; and by said contract it was agreed that the railway company would furnish, on its line between Cincinnati and St. Louis, for the express company, cars adapted to the carriage of express matter over said line; that one or more employes of said express company should accompany said goods in said cars over the said line, and for such purpose should be transported in said cars, free of charge; that the express company should protect the railway company and hold it harmless from all liability for injuries sustained by the employes of the express company while being transported for the said purpose over the
309½ railroad; that Voigt, the defendant in error, had agreed in writing to idemnify the express company against any liability it might incur by reason of said agreement between the companies, so far as he was concerned, and further agreed to release the railroad company from liability for injuries received by him while being transported in the express cars; that, in consideration of

such agreement on his part, Voigt was employed as an express messenger and while so employed, and while occupying as such messenger a car assigned to the express company, received injuries occasioned by a collision, on December 30, 1895, between the train which was transporting the express car and another train belonging to the same railroad company.

It is evident that, by these agreements, there was created a very different relation between Voigt and the railway company than the usual one between passengers and railroad companies. Here there was no stress brought to bear on Voigt as a passenger desiring transportation from one point to another on the railroad. His occupation on the car, specially adapted to the uses of the express company, was not in pursuance of any contract directly between him and the railroad company, but was an incident of his permanent employment by the express company. He was on the train, not by virtue of any personal contract, right, but because of a contract between the companies for the exclusive use of a car. His contract to relieve the companies from any liability to him, or to each other, for injuries he might receive in the course of his employment, was deliberately entered into as a condition of securing his position as a messenger. His position does not resemble
310 the one in consideration in the Lockwood and similar cases, where the dispensation from liability for injuries was made a condition of a transportation which the passenger had a right to demand, and which the railroad companies were under legal duty to furnish. Doubtless, had Voigt only desired the method of transportation afforded the ordinary passenger, he would have been entitled to the rule established for the benefit of such a passenger. But this he did not desire. He was not asking to be carried from Cincinnati to St. Louis, but was occupying the express car as part of his regular employment, and as provided in a contract which, as we have seen, the railroad company was under no local compulsion to enter into.

The relation of an express messenger to the transportation company, in cases like the present one, seems to us to more nearly resemble that of an employe than that of a passenger. His position is one created by an agreement between the express company and the railroad company, adjusting the terms of a joint business—the transportation and delivery of express matter. His duties of personal control and custody of the goods and packages, if not performed by an express messenger, would have to be performed by one in the immediate service of the railroad company. And, of course, if his position was that of a common carrier employe of both companies, he could not recover for injuries caused, as would appear to have been the present case, by the negligence of
311 fellow-servants.

However this may be, it is manifest that the relation existing between express messengers and transportation companies, under such contracts as existed in the present case, is widely different from that of ordinary passengers, and that to relieve the defendant in error from the obligation of his contract would require us to give

a much wider extension of the doctrine of public policy than was justified by the facts and reasoning in the Lockwood case.

This subject has received attentive consideration in several of the state courts.

In Bates v. Old Colony Railroad, 147 Mass. 255, it was held that if an express messenger holding a season ticket from a railroad company and desiring to ride for the conduct of his business in a baggage car, agrees to assume all risk of injury therefrom, and to hold the company harmless therefor, the agreement is not invalid as against public policy, and he cannot recover for injuries caused by the negligence of the company's servants. In its opinion the court said:

"The question of the right of carriers to limit their liability for negligence in the discharge of their duties as carriers by contract with their customers or passengers in regard to such duties does not arise under the contract as construed in this case. See Railroad Co. v. Lockwood, 17 Wall. 357; Griswold v. New York & New England Railroad, 53 Conn. 371. It was not a contract for carriage over the road, but for the use of a particular car. The consideration
312 of the plaintiff's agreement was not the performance of anything by the defendant which it was under any obligation to do, or which the plaintiff had any right to have done. It was a privilege granted to the plaintiff. The plaintiff was not compelled to enter into the contract in order to obtain the rights of a passenger. Having these rights, he sought something more. * * * The fact that the plaintiff was riding in the baggage car as an express messenger in charge of merchandise which was being transported there, shows more clearly that the contract by the express company and the plaintiff was not unreasonable or against public policy. He was there as a servant engaged with the servants of the railroad company in the service of transportation on the road. His duties were substantially the same as those of the baggage master in the same car; the latter relating to merchandise carried for passengers and the former to merchandise carried for the express company. His actual relations to the other servants of the railroad corporation engaged in the transportation were substantially the same as those of the baggage master, and would have been the same had he been paid by the corporation instead of by the express company. Had the railroad done the express business, the messenger would have been held by law to have assumed the risk of the negligence of the servants of the railroad. It does not seem that a contract between the express company and the plaintiff on the one hand, and the defendant on the other, that the express messenger in performing his duties should take the same risk of injury from the negligence of the
313 servants of the railroad engaged in the transportation that he would take if employed by the railroad or perform the same duties, would be void as unreasonable or as against public policy."

The same ruling prevailed in the subsequent case of Hosmer v. Old Colony Railroad, 156 Mass. 506.

Robertson v. Old Colony Railroad, 156 Mass. 526, was an action

brought for personal injuries caused to the plaintiff, an employe of the proprietors of a circus, while riding in a car belonging to the proprietors, drawn by the defendant company over its road under a written agreement, in which it was provided that the circus company should agree to exonerate and save harmless the defendant from any and all claims for damages to persons or property during the transportation, however occurring, and it was held that, as the defendant company was under no common law or statutory obligation to carry the plaintiff in the manner he was carried at the time of the accident, it did not stand towards him in the relation of a common carrier, and that the plaintiff could not recover.

Griswold v. New York & New England Railroad, 53 Conn. 371, where a restaurant keeper had the privilege to sell fruit and sandwiches on the trains and to engage and keep a servant for that purpose on the trains, riding on a free pass, it was held that such servant could not recover for injuries sustained on the train caused by the negligence of the company's servants, because he was not a passenger.

314 The Supreme Court of Michigan, in Coup v. Wabash, St. Louis &c. Railway Co., 56 Michigan, Ill., where a railroad company, under a special agreement, was to furnish men and motive power to transport a circus of the plaintiff from Cairo to Detroit on cars belonging to the plaintiff, stopping at certain named points for exhibition, the plaintiff paying a fixed price therefor, held, that such transportation was not a transaction with a common carrier as such; that the contract was valid, and that the railway company was not liable for injury due to negligence.

Where a railroad company made a special contract in writing with the owner of a circus to haul a special train between certain points, at specified prices, and stipulating that the railroad company should not be liable for any damage to the persons or property of the circus company from whatever cause, it was held by the Circuit Court of Appeals of the Seventh Circuit, citing Coup v. Railroad Co., 56 Michigan, 111, and Robertson v. Old Colony Railroad, 156 Mass. 506, that the railroad company was not acting as a common carrier, and was not liable under the contract for injuries occasioned by negligent management of its trains. In its opinion the court quoted the following passage from Railroad Co. v. Lockwood: "A common carrier may undoubtedly become a private carrier or bailee for hire when, as matter of accommodation or special engagement, he undertakes to carry something which is not his business to carry." Chicago, Milwaukee & St. Paul Railroad v. Wallace, 24 U. S. App. 589.

315 Louisville, New Albany & Chicago Railway v. Keefer, 146 Ind. 21, 34, was a case in all respects like the present. It was a suit by a messenger of the American Express Company against the railroad company for personal injuries. The contracts between the express company, the messenger and the railroad company were in terms similar to those existing in the present case, and the defence was the same as that made here. It was held that the contracts were valid and that the defence was good. It was said:

"Under the doctrine declared in the express cases, 117 U. S. 1, the

property was being carried by appellant, not as a common carrier in the performance of a public duty, but being carried, with a messenger in charge, as a private carrier, the right to have it and him carried having first been secured to the express company by private contract, the only way known to the law by which the right, either as to the goods or appellee as messenger in charge, could be so acquired.

"Appelle-, when he went on the appellant's train and took charge of the express packages in the baggage car, did not go as a passenger who merely desired to be carried on the train from one point to another. Carriage was not the object of his going upon the train; that was merely incidental. His purpose was not to be upon the train, in cars provided for passengers, but that he might handle and care for the property of his employer thereon, in the space set apart in the baggage c[illegible] for that purpose. Under the authorities cited it was not
the duty of the appellant, as a common carrier to carry for
316 the express company the goods or messengers in charge of
them. The contract between appellant and the express company gave it and its messenger rights which appellant as a common carrier could not have been compelled to grant."

By the Supreme Court of Indiana, in Pittsburg-, Cincinnati &c. Railway v. Mahoney, 148 Indiana, 196, it was held that railway companies may contract as private carriers in transporting express matter for express companies, and in such capacity may require exemption from liability for negligence as a condition to the obligation to carry, and that a release by an employe of an express company of *of* all liabilitiy for injuries sustained by the negligence of the employe or otherwise includes the liability of the express company, to hold a railroad company with which it does business, harmless against claims by employes of the express company, for injuries and precludes an action against the railroad company for causing his death while in the discharge of his duty as an employe of such express company.

A precisely similar question was presented in the case of Blank v. Illinois Central Company, and was decided in the same way, by the Appellate Court for the First District of Illinois, in an opinion rendered March 14, 1899, 80 Ill. App. 475. The court cites the express cases, and approves and applies the reasoning in the Indiana cases; and this judgment has been affirmed by the Supreme Court of Illinois, 182.

The same doctrine prevails in the State of New York. Bissel v. New York Central Railroad, 25 N. Y. 442; Poucher v. New York Central Railroad, 49 N. Y. 263. Though it must be allowed that
the New York decisions are not precisely in point, as those
317 courts do not accept the doctrine of Railroad Company v.
Lockwood to its full extent, but hold that no rule of public policy forbids contractual exemption from liability, because the public is amply protected by the right of every one to decline any special contract, on paying the regular fare prescribed by law, that is, the highest amount which the law allows the company to charge.

As against these authorities there are cited, on behalf of the defendant in error, several cases in which it has been held that postal

clerks in the employ of the Government, and who pay no fare, are entitled to the rights of ordinary passengers for hire; and it is contended that their relation to the railroad company is analagous to that of express messengers. Arrosmith v. Nashville & Decatur Railroad, 57 Fed. Rep. 165; Gleeson v. Virginia Midland Railroad, 140 U. S. 435; Ketcham v. New York, Lake Erie &c. Railroad, 133 Indiana, 346; Seybolt v. Railroad Co., 95 N. Y. 562.

There is, however, an obvious distinction between a postal clerk the present case of an express messenger in this, that the messenhas agreed to the contract between the express and the railroad panies, exempting the latter from liability, but no case is cited which the postal clerk voluntarily entered into such an agreeent. To make the cases analagous it should be made to appear t the Government, in contracting with the railroad company to y the mails, stipulated that the railroad company should be exted from liability to the postal clerk, and that the latter, in conration of securing his position, had concurred in releasing the railroad company.

Brewer v. New York, Lake Erie & Western Railroad, 125 N. Y. 59, is also cited as a case wherein a recovery was maine by an express messenger against a railroad company, and e there existed an agreement between the express company and ilroad company that the latter should be indemnified and pro against all risks and liabilities. But the court put its judgagainst the railroad company expressly upon the ground that essenger had no knowledge or information of the contract be the companies, and was not himself a party to the agreement mpt the railroad company. Kenny v. N. Y. Cent. &c. Rail-125 N. Y. 422, was also a case where, in an action for damages express messenger against a railroad company, the plaintiff ermitted to recover, notwithstanding there was an agreement en th companies that the railroad company should be released demnified for any damage done to the agents of the express any, whether in their employ as messenger or otherwise. But not appear that there had been any assent to or knowledge of ontract on the part of the messenger; and the court said:

ur decision, however, is placed upon the ground that this condoes not, in unmistakable language, provide for an exemption liabili.y for the negligence of the defendant's employes. The s firmly established in this state that a common carrier may ct for immunity from its negligence or that of its agents; but o accomplish that object the contract must be so expressed and e left to a presumption from the language. Considerations upon public policy and the nature of the carrier's undertaking influence the application of the rule, and forbids its operation except when the carrier's immunity from the consequences of negligence is read in the agreement ipsissierbis."

umberlain v. Pierson, 59 U. S. App. 55, 64, in the Circuit Court peals of the Fourth Circuit, was a case in which an express

messenger was injured while traveling on a railroad which had a contract with the express company, exonerating the foreman from responsibility for injuries to the agents of the latter, and in which said agreement was ineffectually pleaded in bar of the action. The court said:

"The discussion of this feature of the case presents this question: Was the plaintiff below, as a messenger of the express company, bound by the contract between the railroad company and the express company to assume all risks to life and limb to which he was exposed in performing his duties on the train as an express messenger? He was not a party to the contract, never ratified it, and in his testimony, when asked if he knew of this provision of the contract, answered, 'If I had known that I wouldn't have gone.'"

Without enumerating and appraising all the cases respectively cited, our conclusion is that Voigt, occupying an express car as a messenger in charge of the express matter in pursuance of the contract between the companies, was not a passenger within the meaning of the case of Railroad Company v. Lockwood; that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the
320 same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger, and that such a contract did not contravene public policy. Accordingly,

We answer the question submitted to us by the Judges of the Circuit Court of Appeals in the negative; and it is so ordered.

Mr. Justice HARLAN, dissenting.

In Railroad Co. v. Lockwood, 17 Wall. 357, 384, it was held that a "common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law;" that "it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants;" that "these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter;" and that "a drover traveling on a pass, such as was given in this case, is a passenger for hire." The railroad pass refer-ed to declared that its acceptance was to be considered a waiver for all claims for damages or injuries received on the train. The above principles have been recognized and enforced by this court in numerous cases.

I am of opinion that the present case is within the doctrines of Railroad Co. — Lockwood, and that the judgment should be affirmed upon the broad ground that the defendant corporation could
321 not, in any form stipulate for exemption from responsibility for the negligence of its servants or employes in the course of its business whereby injury comes to any person using its cars, with its consent, for purposes of transportation. That the person transported is not technically a passenger and does not ride in a car ordinarily used for passengers is immaterial.

Mr. Herdman: The defendant now offers in evidence decision of the Supreme Court of the United States in the case of Adams Express Company vs. Croninger as reported in Volume 226 of the Official Reports of the Supreme Court of the United States on pages 491 to 513 inclusive.

Mr. Mahoney: The offer is objected to as immaterial in that the decision of the United States Supreme Court on the question of common law is immaterial in this case and incompetent, and that the decisions of that court are not the proper methods of proving the laws of the United States.

There being no objection on the ground of identification of the offer as to its being in fact a correct report of the decision of the United States Supreme Court.

The Court: The objection is overruled.

To which ruling of the court the plaintiff, by his counsel, excepted.

The same is received and read in evidence, a copy of which is as follows:

322 226 U. S.

ADAMS EXPRESS COMPANY

v.

CRONINGER.

Error to the Circuit Court of Kenton County, State of Kentucky.

No. 18. Argued March 13, 1912; Reargued October 23, 1912. Decided January 6, 1913.

The constitutional power of Congress to regulate commerce among the states and with foreign nations comprehends power to regulate contracts between shipper and carrier of shipments in such commerce in regard to liability for loss or damage to articles carried.

Until Congress has legislated upon that subject, the liability of a carrier, although engaged in interstate commerce, for loss or damage to property carried, may be regulated by law of the state.

Since the decisions of this court in Chicago, Milwaukee & St. Paul Railway v. Solan, 169 U. S. 133, and Pennsylvania Railroad v. Hughes, 191 U. S. 477, Congress has by §20 of the Hepburn Act of June 29, 1906, 34 Stat. 584, c. 3591, known as the Carmack amendment, legislated directly upon the carrier's liability for loss of and damage to interstate shipments, and this legislation supersedes all regulations and policies of a particular State upon the same subject.

Only the silence of Congress authorizes the exercise of the police power of the State upon the subject of contracts with carriers for interstate shipments, and when Congress exercises its authority the regulating power of the state is at an end.

323 In enacting the Carmack amendment it is evident that Congress intended to adopt a uniform rule as to the liability

imposed upon interstate carriers by state regulations of bills of lading and to relieve such contracts from the diverse regulation to which they had theretofore been subject.

A proviso reserving certain rights of action will not be construed as nullifying the statute itself and maintaining the existing confusion which — was the purpose of Congress to put an end to; and so held that the proviso in the Carmack amendment related to remedies under existing Federal law at the time of this action and not to any state law.

A rational interpretation will be given to a statute and a proviso and not one by which the statute will, through the proviso, destroy itself.

A common carrier cannot exempt himself from liability for his own negligence or that of his employes, but the rigor of this rule may be modified by a fair, reasonable and just agreement with the shipper which does not include exemption from such negligence; and the right to receive compensation commensurate with the risk involves the right to agree upon the rates proportionate with the value of the property transported.

An interstate carrier may, by a fair, open and reasonable agreement, limit the amount recoverable by the shipper to an agreed value made for the purpose of obtaining the lower of two or more rates proportioned to the amount of risk.

A limitation of liability based upon and agreed value to ob-
324 tain a lower rate does not conflict with any sound principle of public policy; and it is not conformable to plain principles of justice that a shipper may understate value in order to reduce the rate and then recover a larger value in case of loss.

The provisions of the Carmack amendment are not violated by a plain provision in a bill of lading basing the charges on value of article transported and charging higher rates for increasing liability as value is declared; and so held as to express rates filed with the Interstate Commerce Commission.

This was an action in the Circuit Court of Kenton County, Kentucky, against the Express Company to recover the full market value of a small package containing a diamond ring which was delivered by the plaintiff below to the Express Company at its office in Cincinnati, Ohio, consigned to J. W. Clendenning at Augusta, Georgia. The package was never delivered. The Express Company made defense by answer. The plaintiff demurred to the answer as not containing a defense, which demurrer was sustained. The company declined to further plead, whereupon the Circuit Court gave judgment for the sum of $137.52, being the full value of the ring and interest. A writ of error was sued out from this court to the Circuit Court of Kenton County, that being the highest court of the State in which a decision could be had.

The answer and accompanying exhibit were in substance as follows:

325 That the defendant was an express company engaged in interstate commerce within the provisions of the act of Congress of June 29, 1906; that in obedience to that act it had been

duly filed with the Interstate Commerce Commission schedules showing its rates and charges from Cincinnati to Augusta, Georgia, which schedules showed that its rates and charges, when the value of the property to be carried was in excess of fifty dollars, were graduated reasonably, according to the value, and that the lawful rate upon the package of the plaintiff from Cincinnati to Augusta was twenty-five cents if the value was fifty dollars or less, and was fifty-five cents if its value was one hundred and twenty-five dollars.

It is averred that the plaintiff knew that the charges upon the package shipped were based upon the value of the shipment, and that it (the defendant) required that the value should be declared by the shipper, and that if he did not disclose and declare the value when he delivered the shipment to it at Cincinnati for transportation to Augusta, the rate charged would be based upon a valuation of fifty dollars.

It is then alleged that the package so delivered was sealed and that the defendant did not know the contents or value, and that if it had it would not have received it for carriage for less than the lawful published rate of fifty-five cents. The receipt or bill of lading issued shows no value, but contains a stipulation in these words:

"In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not
326 more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein."

Mr. Lawrence Maxwell, with whom Mr. Joseph S. Graydon was on the brief, for plaintiff in error:

The judgment of the state court denies effect to the general purpose and to specific provisions of the Interstate Commerce Acts, and deprives defendant of rights secured thereby. New Haven R. R. v. Interstate Commerce Comm., 200 U. S. 361, 395; Armour Packing Co. v. United States, 209 U. S. 56, 72; Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U. S. 426; Texas & Pacific Railway Co. v. Mugg, 202 U. S. 242; Louisville &c. Nashville Railroad Co. v. Mottley, 219 U. S. 467; Union Pacific Ry. Co. v. Goodridge, 149 U. S. 690; Baltimore & Ohio R. R. Co. v. Pitcairn Coal Company, 215 U. S. 481; Melody v. Great Northern Ry. Co., 25 S. Dak. 606.

A public policy of the United States of uniform application is necessarily established by the acts to regulate commerce, which is inconsistent with the power formerly existing in the states to compel an interstate carrier to answer for more than the amount on which the rate was based to a shipper who has secured an illegally low rate.

Initial carriers are not subject to the liability imposed by varying state laws for loss or damage to interstate shipments, because Congress has assumed possession of the dominion of such liability under the Carmack amendment of June 29, 1906.

327 Pennsylvania Railroad Co. v. Huges, 191 U. S. 477, was affirmed on authority of Chi., Mil. &c. Ry. Co. v. Solan, 169 U. S. 133, but numerous changes have been made in the Interstate Commerce Act since then as both the Elkins Act and the Carmack amendment are subsequent to the transactions involved in those cases.

The main purpose of the Carmack amendment was to give the holder of the bill of lading, which the carrier to whom the goods were delivered for transportation is required to issue, a right of action against such carriers for loss caused by connecting carriers, with a right in the initial carrier to recover over against the connecting carrier. Atlantic Coast Line v. Riverside Mills, 219 U. S. 186.

The right thus cre-ted was not a right unknown to existing law. Mo., Kas. &c. Tex. Ry. Co. v. McCann, 174 U. S. 880; Southern Pacific Ry. Co. v. Crenshaw, 63 S. E. Rep. 685.

State action is inhibited when Congress has spoken. Northern Pacific Ry. Co. v. Washington, 222 U. S. 370; Southern Ry. Co. v. Reid, 222 U. S. 424; Southern Ry. Co. v. Reid & Beam, 222 U. S. 444.

The proviso cannot be construed so as to leave in existence rights of action under state law which apply to the same subject-matter, for to admit that the matter with which Congress dealt remained subject to state power, is to cause the act of Congress to destroy itself. Northern Pacific Ry. Co. v. Washington, 222 U. S. 370, 378; Southern Pacific Co. v. Crenshaw, 63 S. E. Rep. 865.

328 Defendant's liability under §20 of the Interstate Commerce Act does not exceed fifty dollars, and the judgment of the state court for more than that amount deprives the defendant of a Federal right. Pennsylvania R. R. Co. v. Huges, 191 U. S. 477, 486; Hart v. Penn. R. R. Co., 112 U. S. 331.

At common law, while the right of the carrier to inquire as to the value of a package in order to determine his freight was always recognized, it was held in the absence of such inquiry, that the shipper was under no obligation to disclose the value. But as early as 11 Geo. IV, and 1 Wm. IV, C. 68, it was provided by statute in England that a carrier should not be liable beyond ten pounds unless at the time of making the shipment, the shipper, if the goods were of greater value, should so declare to the carrier and declare accordingly. And see Gibbon v. Paynton, 4 Burr. 2298 (1769); Clay v. Willan, 1 H. Bl. 298 (1789); Izett v. Mountain, 4 East, 371 (1803); Batson v. Donovan, 4 B. & Ald. 21 (1820); Hinton v. Dibbin, 2 Ad. & E. (N. S.) 646; Kidd v. Greenwich Ins. Co., 35 Fed. Rep. 351; Calderon v. Atlas S. S. Co., 64 Fed. Rep. 874; Calderon v. Atlas S. S. Co., 69 Fed. Rep. 574; The Kensington, 88 Fed. Rep. 331; Jennings v. Smith, 106 Fed. Rep. 139; Saunders v. Southern Ry., 128 Fed. Rep. 15; Macfarlane v. Adams Express Co., 137 Fed. Rep. 982; Missouri &c. Ry. of Texas v. Patrick, 144 Fed. Rep. 632; Taylor v. Weir, 162 Fed. 585; Blackwell v. Southern Pac. Co., 184 Fed. Rep. 489; Pierce Co. v. Wells Fargo Co., 189 Fed. Rep. 561; Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 442; Calderon v. Atlas S. S. Co., 170 U. S. 272; The Kensington, 183 U. S. 263;

Alair v. Railroad Company, 53 Minnesota, 160; Douglas Co. v. Railway Co., 62 Minnesota, 288; O'Malley v. Railway Co., 86 Minnesota, 380; Loeser v. Chicago, M. & St. Paul Ry. Co., 94 Wisconsin, 150; Baltimore & Ohio Ry. Co. v. Hubbard, 72 Oh. St. 302.

329 See also cases under the Carmack amendment, Bernard v. Adams Express Co., 205 Massachusetts, 254; Greenwald v. Barrett, 199 N. Y. 170; Travis v. Wells, Fargo & Co., — 79 N. J. L. 83; P. C. C. & St. L. Ry. Co. v. Mitchell, 91 N. E. Rep. 735; Larsen v. Oregon Short Line, 110 Pac. Rep. 983.

Plaintiff cannot maintain the action because it is founded on a transaction on his part which is declared to be a fraud on the defendant and a public offense by acts of Congress.

Not only does the judgment of the Kentucky court render nugatory the general purposes of the Interstate Commerce Acts, but it was based on a transaction expressly prohibited and made a misdemeanor by §10 of the act, and by the Elkins Act. Armour Packing Company v. United States, 209 U. S. 63, 69.

A transaction which constitutes a violation of these sections cannot be the basis of an action. Ellison v. Adams Express Co., 245 Illinois, 410; Matter of Released Rates, 13 I. C. C. Rep. 550. And see Conference Rulings of the Commission, Bulletin No. 5, April 1, 1911; Frank v. Adams Express Co., Pitts. Leg. Jour. May 20, 1908, O. S. Vol. LV. N. S. XXXVIII (Common Pleas Court No. 1 Allegheny County).

Mr. John Randolph Schindel, with whom Mr. Morrison R. Waite was on the brief, for defendant in error:

The contract embodied in the receipt was void under §196 of the Kentucky constitution which provides that no common carrier shall be permitted to contract for relief from its common-law lia-

330 bility. Southern Express Co. v. Fox, 131 Kentucky, 257; Adams Express Company v. Walker, 119 Kentucky, 121; Louisville & N. R. Co. v. Frazee, 24 Ky. L. Rep. 1273; Ohio & M. R. Co. v. Tabor, 98 Kentucky, 503; Cincinnati, N. C. & T. P. R. Co. v. Graves, 21 Ky. L. Rep. 684; Illinois C. R. Co. v. Radford, 23 Ky. L. Rep. 886.

The judgment of the state court did not deprive the defendant of any right, privilege, or immunity secured by the Interstate Commerce Act.

Section 196 of the Kentucky constitution deals with the right of a common carrier to relieve itself from liability for the acts of its connecting carriers, who, in effect, are made its agents instead of the agents of the shipper.

The provisions of the act relied upon deal with two subjects-matter: rates and liability of the initial carrier for losses incurred by connecting carriers. The subject-matter of §196 of the Kentucky constitution is not rates, and it does not deal with the right of a common carrier to limit its liability for the acts of its connecting lines. It deals solely and exclusively, and its subject matter is confined to the right of a common carrier to contract for relief from its common law liability, for its own acts. The Interstate Commerce Act does not deal with the same subject-matter as this section of the Kentucky

constitution; and a Kentucky court, having jurisdiction of the parties, was entitled to interpret and to apply that law as it understood it without regard to the Federal statutes.

For the purpose of the Interstate Commerce Act, see Armour Packing Company v. United States, 209 U. S. 56; N. Y., N. H. & H. R. R. v. Int. Com. Comm., 200 U. S. 361; Texas & Pacific Railway Co. v. Abilene Cotton Oil Company, 204 U. S. 426;
331 Louis. & Nash. R. R. Co. v. Mottley, 219 U. S. 467.

These sections of the act deal only with rates, and it cannot be said that Congress has legislated or attempted to legislate upon the subject dealt with by the state law. Gulf, Colorado & Santa Fe Railway Co. v. Hefley, 156 U. S. 98, distinguished, as both the Federal and the *the* state statutes dealt with the same subject matter.

The state court had the right to administer the common law of Kentucky as it saw it, and unless the Congress of the United States has sought to prohibit a carrier engaged in interstate transportation from limiting, or to permit such a carrier to limit, its liability to a stipulated valuation, or has legislated upon that "precise" subject, the State of Kentucky may require common carriers although engaged in interstate commerce, to answer for the whole loss resulting from their negligence, whether there is a contract or not. Pennsylvania Railroad Company v. Huges, 191 U. S. 477; Chi., Mil. &c. Ry. Co. v. Sloan, 169 U. S. 133.

It was not the intention of Congress in prohibiting a common carrier from limiting its liability with respect to the obligations imposed by the Interstate Commerce Act, to wipe out every regulation made or upheld by the different States for the protection of their shippers. Bernard v. Adams Express Co., 205 Massachusetts, 254, and Greenwald v. Barrett, 199 N. Y. 170.

The right of plaintiff to recover, even if the action was founded on a transaction declared to be a public offense by an act of Congress, was a question of general common law and has been determined in his favor by the Kentucky court. Railroad Company v. Hughes, 191 U. S. 477, 486.
332 Ellison v. Adams Express Co., 245 Illinois, 410, distinguished; and see Adams Express Company v. Walker, 119 Kentucky, 121.

In this case the package was delivered to the express company without any inquiry or demand being made by the defendant to know its value or contents, and there was, therefore, no willful violation of the act. Matter of Released Rates, 13 I. C. C. Rep. 550-554.

Mr. Justice LURTON, after making the foregoing statement, delivered the opinion of the court.

The answer relies upon the act of Congress of June 29, 1906, being an act to amend the Interstate Commerce Act of 1887, as the only regulation applicable to an interstate shipment; and avers that the limitation of value declared in its bill of lading, was valid and obligatory under that act. The defense was denied. This constitutes the Federal question and gives the court jurisdiction.

Under the law of Kentucky this contract, limiting the plaintiff's

recovery to the agreed or declared value, was invalid, and the shipper was entitled to recover the actual value, "u-less," as said in Adams Express Company v. Walker, 119 Kentucky, 121, 129, and affirmed in Southern Express Company v. Fox and Logan, 131 Kentucky, 257, sufficient facts are shown, independently of the special contract, to avoid the contract for fraud or to create an estoppel at common law."

The question upon which the case must turn, is, whether the operation and effect of the contract for an interstate shipment, as shown by the receipt or bill of lading, is governed by the local
333 law of the State or by the Acts of Congress regulating interstate commerce.

That the constitutional power of Congress to regulate commerce among the States and with foreign nations comprehends power to regulate contracts between the shipper and the carrier of an interstate shipment by defining the liability of the carrier for loss, delay, injury or damage to such property, needs neither argument nor citation of authority.

But it is equally well settled that until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular state, although engaged in the business of interstate commerce, for loss or damage to such property, may be regulated by the law of the State. Such regulations would fall within that large class of regulations which it is competent for a State to make in the absence of legislation by Congress, growing out of the territorial jurisdiction of the State over such carriers and its duty and power to safeguard the general public against acts of misfeasance and non-misfeasance committed within its limits, although interstate commerce may be indirectly affected: Smith v. Alabama, 124 U. S. 465; New York &c. Railroad v. New York, 165 U. S. 628; Chicago, Milwaukee & St. Paul Ry. v. Solan, 169 U. S. 133, 137; Richmond &c. Ry. v. Patterson Co., 169 U. S. 311; Cleveland &c. Ry. v. Illinois, 177 U. S. 477. In the Solan case, cited above it was said of such state legislation:

"They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits."
334 In that case the court upheld the validity of an Iowa statute which made void every "contract," receipt, rule or regulation, which shall exempt any railway from liability as a common carrier, which would exist had no contract, receipt, rule or regulation been made or entered into."

The contract there involved was for transportation of cattle with a drover in charge, and the shipper had signed a contract limiting the liability to himself or the drover to $500 for injury to the person of the drover. Proof was offered that this limitation was the consideration for a reduced rate of transportation.

In Pennsylvania Railroad v. Hughes, 191 U. S., 477, 487, 491, there was involved a bill of lading in all essentials identical with the one here concerned, whereby it was stipulated that in consideration of a reduced rate of freight, the shipper should receive, in case of negligent loss, the agreed value declared in the receipt. The shipment was made in New York, where the stipulation was valid, to a point in Pennsylvania, where such a limitation was invalid. The loss occurred in the latter state, and the Supreme Court of the State upheld a judgment for the full value, declaring the limitation invalid as forbidden by the public policy of that State. That case came to this court upon the contention that the Pennsylvania court in refusing to limit the recovery to the valuation agreed upon had denied to the railroad company a right or privilege secured to it by the Interstate Commerce Law. But this court as to that said (p. 487):

335 "It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms of law relied upon we fail to find any such provision therein. The sections of the interstate commerce law relied upon by the learned counsel for plaintiff in error, 24 Stat. 379, 382; 25 U. S. Stat. 855, provide for equal facilities to shippers for the interchange of traffic; for non-discrimination in freight rates; for keeping schedule of rates open to public inspection; for posting the same in public places, with certain particulars as to charges, rules or regulations; for the publication of joint tariff rates for continuous transportation over one or more lines, to be made public when directed by the Interstate Commerce Commission; against advances in joint tariff rates except after ten days' notice to the commission; against reduction of joint tariff rates except after three days' like notice; making it unlawful for any party to a joint tariff to receive or demand a greater or less compensation for the transportation of property between points as to which a joint tariff is made different than is specified in the schedule filed with the commission, giving remedies for the enforcement of the foregoing provisions, and providing penalties for their violation; making it unlawful to prevent continuous carriage, and providing that no break of bulk, stoppage or interruption by the carrier, unless made in good faith for some necessary purpose without intention to evade the act, shall prevent the carriage of freights from
336 being treated as one continuous carriage from the place of shipment to the place of destination.

"While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valu-

ations, and, until Congress shall legislate upon it, is there any valid objection to the State enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage."

In view of the decisions of this court in the two cases last referred to, we shall assume that this case is governed by them, unless the subsequent legislation of Congress is such as to indicate a purpose to bring contracts for interstate shipments under one uniform rule of law not subject to the varying policies and legislation of particular States.

The original Interstate Commerce Act of February 4, 1887, 24 Stat. 379, c. 104, was extensively amended by the act of June 29, 1906, 34 Stat. 584, c. 3591. We may pass by many of the changes and amendments made by the latter act as not decisive, and come at once to the far more important amendment made on, an amendment bearing directly upon the carrier's liability or obligation under interstate contracts of shipment, and generally referred to
337 as the Carmack amendment. For convenience of reference, it is set out in the margin.*
338 This amendment came under consideration in Atlantic Coast line v. Riverside Mills, 219 U. S. 186, but the opinion and judgment was confined to that provision of the act which made the initial carrier liable for a loss upon the line of a connecting carrier, the property having been received under a bill of lading which confined the liability of the initial carrier to loss occurring upon its own line.

The significant and dominating features of that amendment are these:

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* That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any such loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or tansportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained, the amount of such loss, damage or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript.

First. It affirmatively requires the initial carrier to issue "a receipt or bill of lading therefor," when it receives "property for transportation from a point in one State to a point in another."

Second. Such initial carrier is made "liable" to the lawful holder thereof for any loss, damage or injury to such property caused by it."

Third. It is also made liable for any loss, damage or injury to such property caused by any "common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass."

Fourth. It affirmatively declares that "no contract receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed."

Prior to that amendment the rule of carrier's liability, for an interstate shipment of property, as enforced in both Federal and state courts, was either that of the general common law as declared by this court and enforced in the Federal Courts throughout
339 the United States, Hart v. Pennsylvania Railroad, 112 U. S. 331; or that determined by the supposed public policy of a particular State, Pennsylvania Railroad v. Hughes, 191 U. S. 477; or that prescribed by statute law of a particular State, Chicago &c. Railroad v. Solan, 169 U. S. 133.

Neither uniformity of obligation nor of liability was possible until Congress deal- with the subject. The situation was well depicted by the Supreme Court of Georgia in Southern Pacific Co. v. Crenshaw, 5 Georgia, App. 67, 687, 63 S. E. Rep. 855, where that court said:

"Some states allowed carriers to exempt themselves from all or part of the common law liability, by rule, regulation, or contract; others did not; the Federal courts sitting in the various states were following the local rule, a carrier being held liable in one court when under the same state of facts he would be exempt from liability in another; hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own State, or for a carrier whose lines were extensive, to know without considerable investigation and trouble and even then often times with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one State to another. The congressional action has made an end of this diversity: for the rational law is paramount and supersedes all state laws as
340 to the rights and liabilities and exemptions created by such transaction.

This was doubtless the purpose of the law; and this purpose will be effectuated, and not impaired or destroyed by the state court's obeying and enforcing the provisions of the Federal statute where applicable to the fact in such cases as shall come before them."

That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the ability of the carrier under

a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist. Northern Pacific Ry. v. State of Washington, 22 U. S. 370; Southern Railway v. Reid, 222 U. S. 424; Mondou v. Railroad, 223 U. S. 1.

To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable and the latter would be to revert to the uncertainties and diversities of rulings which led to the
341 amendment. The duty to issue a bill of lading and the liability thereby assumed are covered in full, and though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which that had been theretofore subject.

What is the liability imposed upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue "for any loss, damage or injury to such property caused by it," or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage or injury from any and every cause, would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words, "any loss or damage," would be to ignore the qualifying words, "caused by it." The liability thus imposed is limited to "any loss, injury or damage caused by it or a succeeding carrier to whom the property may be delivered," and plainly implies a liability for some default in its common law duty as a common carrier.

But it has been argued that the non-exclusive character of this regulation is manifested by the proviso of the section, and that state legislation upon the same subject is not superseded, and that the holder of any such bill of lading may resort to any right of
342 action against such a carrier conferred by existing state law. This view is untenable. It would result in the nullification of the regulation of a national subject and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress to put an end to.

What this court said of §22 of this act of 1906 in the case of Texas Pac. Ry. v. Abilene Cotton Mills, 204 U. S., 425, is applicable to this contention. It was claimed that that section continued in force all rights and remedies under the common law of other statutes. But this court said of that contention what must be said of the proviso

in §20, that it was "evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the Interstate Commerce Act, or by state statute, or common law, not inconsistent with the rules and regulations prescribed by the provisions of this act." Again, it was said, of the same clause, in the same case, that it could "not in reason be construed as continuing in a shipper a common law right the existence of which would be inconsistent with the provisions of the act. In other words, the act cannot be said to destroy itself."

To construe this proviso as preserving to holder of any such bill of lading any right or remedy which he may have had under existing Federal law at the time of his action, gives to it a more rational interpretation than one which would preserve rights and remedies under existing state laws, for the latter view would cause the
343 proviso to destroy the act itself. One illustration would be a right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former. The liability of such succeeding carrier in the route would be that imposed by this statute, and for which the first carrier might have been made liable.

We now come to the question of the validity of the provision in the receipt or bill of lading limiting liability to the agreed value of fifty dollars, as shown therein. This limiting clause is in these words:

"In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein."

The answer states that the schedules which the express company had filed with the Interstate Commerce Commission showed rates based upon valuations; and that the lawful and established rate for such shipment as that made by the plaintiff from Cincinnati to Augusta, having a value not in excess of fifty dollars, was twenty-five cents, while for the same package if its value had been declared to be one hundred and twenty-five dollars, the amount for which the plaintiff sues as the actual value, the lawful charge according to the rate filed and published would have been fifty-five cents.
344 It is further averred that the package was sealed, and its contents and actual value unknown to the defendant's agent.

That no inquiry was made as to the actual value is not vital to the fairness of the agreement in this case. The receipt which was accepted showed that the charge made was based upon a valuation of fifty dollars unless a greater value should be stated therein. The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the commission. That presumption is strengthened by the fact that across the top of this bill of lading

th[illegible] was this statement in bold type, "This Company's charge is ba[illegible]d upon the value of the property, which must be declared by the sh[illegible]per."

[illegible]at a common carrier cannot exempt himself from liability for his [illegible] negligence or that of his servants is elementary. York M[illegible] Illinois Central Railroad, 3 Wall., 107; Railroad Com[illegible]s [illegible]ckwood, 17 Wall., 357; Bank of Kentucky v. Adams Ex[illegible]ompany, 93 U. S., 174; Hart v. Pennsylvania Railroad, 112 U. S., 331, 338. The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. But the rigor of this liability might be modified through any fair, reasonable
345 and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported.

It has, therefore, become an established rule of the common law as declared by this court in many cases that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of a loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk. York Mfg. Co. v. Railroad, 3 Wall., 107; Railroad v. Lockwood, 17 Wall., 357; Hart v. Pennsylvania Railroad, cited above; Phœnix Ins. Co. v. Erie & W. Trans. Co., 117 U. S., 312, 322; Steam Co. v. Phœnix Ins. Co., 129 U. S., 397, 442; New York; L. E. & W. Ry. v. Estill, 147 U. S., 591, 619; Primrose v. W. U. Tel. Co., 154 U. S., 1, 15; Chicago &c. Ry. v. Solan, 169 U. S., 133; Calderon v. Atlas Steamship Company, 170 U. S., 272, 278; Pennsylvania Railroad v. Hughes, 191 U. S., 477, 485.

That such a carrier might fix his charges somewhat in proportion to the value of the property is quite as reasonable and just as a rate measured by the character of the shipment. The principle is that the charge should bear some reasonable relation to the responsibility, and that the care to be exercised shall be in some degree measured by the bulk, weight, character and value of the property carried.

346 Neither is it conformable to plain principles of justice that a shipper may understate the value of his property for the purpose of reducing the rate, and then recover a larger value in case of loss. Nor does a limitation based upon an agreed value for the purpose of adjusting the rate conflict with any sound principle of public policy. The reason for the legality of such agreements is well stated in Hart v. Pennsylvania Railroad, cited above, where it is said (p. 340):

"The limitation as to the value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts

from the carrier the measure of care due the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and *and* of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

347 The statutory liability, aside from responsibility for the default of a connecting carrier in the route, is not beyond the liability imposed by the common law as that body of law applicable to carriers has been interpreted by this court as well as many courts of the States. Greenwald v. Barrett, 199 N. Y., 170, 175; Bernard v. Adams Express Co., 205 Massachusetts, 254, 259. The exemption forbidden is, as stated in the case last cited, "a statutory declaration that a contract of exemption from liability for negligence is against public policy and void." This is no more than this court, as well as other courts administering the same general common law, have many times declared. In the same case, just such a stipulation as that here involved was upheld, the court saying (p. 259):

"But such a contract as we are considering in this case is not an exemption from liability for negligence in the management of property, within the meaning of the statute. It is a contract as to what the property is, in reference to its value. The purpose of it is not to change the nature of the undertaking of the common carrier, or limit his obligation in the care and management of that which is intrusted to him. It is to describe and define the subject matter of the contract, so far as the parties care to define it, for the purpose of showing of what value that is which comes into the carrier's possession, and for which he must account in the performance of his duty as a carrier. It is not in any proper sense a contract exempting him from liability for the loss, damage or injury to the

348 property, as the shipper describes it in stating its value for the purpose of determining for what the carrier shall be accountable upon his undertaking, and what price the shipper shall pay for the service and for the risk of loss which the carrier assumes."

In Greenwald v. Barrett, cited above, the same conclusion was reached as to the nature of the liability imposed and the purport of the exemption forbidden, the court, among other things, saying:

"The language of the enactment does not disclose any intent to abrogate the right of common carriers to regulate their charges for carriage by the value of the goods or to agree with the shipper upon a valuation of the property carried. It has been the uniform practice of transportation companies in this country to make their charges

dependent upon the value of the property carried and the propriety of this practice and the legality of contracts signed by the shipper agreeing upon a valuation of the property were distinctly upheld by the Supreme Court of the Unted States in Hart v. Penn. R. R. Co., 112 U. S., 331, 341."

To the same effect are the cases of Travis v. Wells Fargo Co., 79 N. J. L., 83; Fielder v. Adams Express Co., 69 W. Va., 138; S. C., 71 S. E. Rep., 99; Larsen v. Oregon Short Line, 38 Utah, 130 S. C., 110 Pac. Rep. 983. See also Atkinson v. New York Transfer Co., 76 N. J. L., 608, as to the general rule.

That a carrier rate may be graduated by value and that a stipulation limiting recovery to an agreed value made to adjust the
349 rate is recognized by the Interstate Commerce Commission, see 13 I. C. C. Rep., 550.

We therefore reach the conclusion that the provision of the act forbidding exemptions from liability imposed by the act is not violated by the contract here in question.

The demurrer to the answer of the defendant below should have been overruled.

For this reason the judgment is reversed, with direction to overrule the demurrer, and for such further proceedings as are not inconsistent with this opinion.

350 Mr. Herdman: The defendant offers in evidence decision of the Supreme Court of the United States in the case of the Chicago, Burlington & Quincy Railway Company vs. Miller, as reported in Volume 226 of the Official Reports of the Supreme Court of the United States on pages 513 to 518 inclusive.

Mr. Mahoney: That is objected to as immaterial in that the decision of the United States Supreme Court on the question of common law as in that court is immaterial in this case, and further as incompetent, and that the decisions in that court are not the proper methods of proving the laws of the United States. There being no objections on the ground of the identification of the offer, as its being in fact a correct report of the decision of the United States Supreme Court.

The Court: The objection is overruled.

To which ruling of the court the plaintiff, by his counsel, excepted.

The same is received and read in evidence, a copy of which is as follows:

351 CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY

v.

MILLER.

Error to the Supreme Court of the State of Nebraska.

No. 17. Argued March 8, 1912; reargued October 22, 1912. Decided January 6, 1913.

Adams Express Company v. Croninger, ante, p. 491, followed to the effect that the Carmack Amendment of the Hepburn Act of June 29, 1906, regulating liability of interstate carriers, superseded all state regulations on the same subject.

85 Nebraska, 458, reversed.

The facts, which involve the validity under the Carmack Amendment of schedules of rates based upon value and extent of the liability of the carrier on bills of lading, are stated in the opinion.

Mr. Arthur R. Wells and Mr. Robert B. Scott for plaintiff in error.

Mr. Edwin E. Squires and Mr. H. M. Sullivan, with whom Mr. Norris Brown was on the brief, for the defendant in error.

The Carmack Amendment to the Hepburn Act of June 29, 1906, does not abrogate the Iowa rule that the company can in no way limit its liability, but on the contrary incorporates that rule into the body of the Federal law so that the Federal statute forbids the company in this case to limit its liability.

The Iowa State Court has held that the Carmack Amendment did not contravene *to* local Iowa state rule. Cramer v. Railway Co., 133 N. W. Rep. (Ia.), 387; Betus v. C., B. & Q. R. R. Co., 129 N.
352 W. Rep. (Ia.), 962; Winn v. Am. Ex. Co., 128 N. W. Rep. (Ia.), 663. See also Latta v. Railway Co., 172 Fed. Rep., 850; Miller v. C., B. & Q. Ry. Co., 85 Nebraska, 458; T. & S. F. Ry. Co. v. Rodgers, 113 Pac. Rep., 80; Railway Co. v. Pew, 64 S. E. Rep., 35.

As a matter of fact the Carmack Amendment by necessary construction of language brings the Federal statutes into perfect accord with the Iowa and Nebraska rule, and expressly forbids a railway company from limiting its liability for its own negligence.

This statute clearly deals only with loss "caused" by the carrier, and the carrier is clearly made liable for loss due to its negligence, which is the situation in the case at bar.

The use of the word "any" is of paramount importance. "Any" in this context means "all." 1 Words and Phrases, 421; Monongahela Nav. Co. v. Coon, 47 Am. Dec., 474; 2 Cyc., 472 (note 21); Jones v. Whitworth, 30 S. W. Rep. (Tenn.), 736; L. N. R. Co. v. Mottley, 219 U. S., 479.

Under the decision of Released Rates, 13 I. C. C. Rep., 560, the Interstate Commerce Commission holds to this construction of the Carmack Amendment, and that as a matter of contract the carrier cannot limit its liability for its negligence in whole or in part.

In passing this act, Congress had chiefly in mind to compel the carriers to be fair with the shipper and to prevent discrimination.

353 Instead of the Federal statutes striking down state statutes and constitutions as to non-limitation of liability by conflict therewith, it exhibits no conflict and is in perfect accord with those of the Iowa and Nebraska type.

The carrier cannot, because it filed with the commission a rate proportioned upon a declared valuation, in this case, shield itself from full liability for loss caused by it.

There is no Federal decision upon this point, but see Cramer v. C., B. & Q. Ry. Co., 133 N. W. Rep. (Ia.) 388; Railway Co. v. Pew, 64 S. E. Rep., (Va.) 35.

The question of value as a basis of rates is no more a subject of control than any other feature tending to make freight rates fixed and certain and to prevent discrimination. The value must be true value or so near such as to stamp the proceedings with bona fides. The Federal statutes provide that there shall be no false classification and no false billing. It further provides for penalties for false classification and false billing whether done knowingly or not. To charge a rate upon a false value is to fix a false classification. Such a rate forbidden by law would bind neither carrier nor shipper. T. & P. Ry. Co. v. Mugg, 202 U. S. 242; Railway Co. v. Hefley, 158 U. S. 98; Texas & Pac. Ry. Co. v. Abilene Oil Co., 204 U. S. 431.

A provision for the limitation of liability unless it specifically so recites will not be construed to apply in the event of negligence on part of the carrier. This principle applies in the construction of the schedules made, offered and filed by the carrier. The salutary

354 principle that the carrier should not escape the consequence of its own negligence should not be lightly set aside and its language should not be interpreted to contravene the well-settled principles of public policy unless such interpretation is unavoidable. If the language of the schedules is not so interpreted and if the limitation of liability therein mentioned does not apply in the event of the n-gigence of the carrier, it is not a departure from the schedules filed when the carrier is held fully to such liability as arises from negligent conduct.

The case is not one which under the rule of the Hart Case, 112 U. S. 331, permits of a limitation of liability, because, first, the alternative of rates offered is so arbitrary and unreasonable as to show a purpose of forcing an acquiescence on part of the shipper to the lower rate and thus to procure a limitation of liability; second, the value fixed is not fairly made, the variation from the true value being so great as to show bad faith and that the same was arbitrarily made for the purpose of obtaining a limitation of liability. Released Rates, 13 I. C. C. Rep. 565; Cramer v. Railway Co., 133 N. W. Rep. (Ia.) 387.

A reasonable alternative of rates and an opportunity to contract with full common-law liability at a reasonable differential rate must be offered or the contract will be construed as unreasonable and void. Railway Co. v. Cravens, 38 Am. St. Rep. 280, and see note, 88 Am.

St. Rep. 933; L. N. Ry. Co. v. Smith, 134 S. W. Rep. 866; 6 Cyc. (Carriers), 401; 1 Hutchinson's Carriers, 427; Southern Ry. Co. v. Jones, 31 So. Rep. (Ala.) 501; Railway Co. v. Henlein, 23 Am. St. Rep. 578.

355 It cannot be said that the Carmack Amendment or any other Federal statute validates in terms a contract limiting liability for negligence of carriers. At most it can only be said that it does not forbid them. If then the question of estoppel is left for determination of principles of the common law, the state court may determine and apply these principles for itself. As long as the Federal statute is not in conflict with the law of the State, the latter remains operative and a carrier cannot limit its liability in the States of Iowa and Nebraska. The state statutes forbidding limitation of liability are enacted under the police power of the State, and so long as the state and Federal statutes are not in conflict both may stand. Cramer v. Railway Co., 133 N. W. Rep. 387; Railway Co. v. Solan, 169 U. S. 98; Railway Co. v. Hefley, 158 U. S. 98; Hennington v. Georgia, 163 U. S. 299; Bridge Co. v. Kentucky, 154 U. S. 204; Transportation Co. v. Parkersburg, 107 U. S. 691.

Mr. Justice LURTON delivered the opinion of the court.

The question in this case, as in the Adams Express Company v. Croninger, just decided, is whether the provisions of §20 of the Act of February 4, 1887, as amended by the act of June 29, 1906, 34 Stat. 584, c. 3591, constitute an exclusive regulation of contracts for interstate shipments of property by railroad common carriers, superseding all state regulations upon the same subject.

The action in this case was to recover the full value of a stallion shipped from a point in Iowa to a point in Nebraska, under a valued live stock contract. The loss occurred in the state of Nebras-
356 ka through the negligence of the carrier, and the suit was in a court of that state.

The receipt or bill of lading placed a value upon the animal of two hundred dollars, and was signed by the shipper's agent. It recited that the schedules of rates and regulations filed with the Interstate Commerce Commission provide alternative rates of charges proportioned to the value of the stock delivered for transportation, as declared by the shipper, and that the recovery of the shipper in the case of loss or injury should not be in excess of the value this agreed upon for the purpose of determining the rate.

The plaintiff's claim is that the stallion was in fact of the value of two thousand dollars, and that the limitation of recovery stipulated is void under a statute of Iowa, where the contract was made, and also illegal and invalid under a clause in the constitution of Nebraska, the State in which the loss occurred and of the forum.

The company relies upon the provisions of the act of 1906 as an exclusive rule regulating every contract for an interstate shipment and declaring the liability of the carrier, and contends that the regulations provided by §20 of that act operate to supersede the legislation of both Iowa and Nebraska, in so far as they applied to interstate shipments.

This defense was overruled in the trial court, and the agreement in the plaintiff's bill of lading limiting any recovery in case of loss or damage to the value declared for the purpose of obtaining the lower or alternative rate of freight, was held to be illegal both under the law of Iowa and Nebraska, and judgment was rendered for the full value of the animal.

357 This judgment was affirmed by the Supreme Court of Nebraska, that court ruling that the case was controlled by the state regulations referred to, and that these regulations had not been superseded by acts of Congress regulating interstate commerce. For this the court cited and relied upon certain decisions by the Nebraska courts, and the cases of Chicago, M. & St. P. Ry. Co. v. Bolan, 169 U. S. 133, and Pennsylvania Railway v. Hughes, 191 U. S. 477. Both of the cases decided by this court were decided prior to the extensive amendment of the act regulating interstate commerce of 1887 by the act of June 29, 1906.

In Adams Express Company v. Croninger, just decided, ante, p. 491, we reached the conclusion that by the provisions of §20 of the latter act of Congress had manifested a purpose to take possession of the subject of the liability of a carrier by railroad for interstate shipments, and that the regulations therein had superseded all state regulations upon the same subject. This case is therefore controlled by that judgment.

It follows that the Supreme Court of Nebraska erred in applying to the contract here involved the provisions of the Iowa statute, and of the constitution of the State of Nebraska, and in refusing to apply the exclusive regulation prescribed by §20 of the act of 1906, as that provision has been construed by this court in the Croninger Case, above referred to.

The judgment is accordingly reversed and remanded for further proceedings not inconsistent with this opinion.

358 Mr. Herdman: The defendant offers in evidence decision of the Supreme Court of the United States in the case of Chicago, St. Paul, Minneapolis & Omaha Railway Company vs. Latta, as reported in Volume 226 of the Official Reports of the Supreme Court of the United States, on pages 519 and 520 of said volume.

Mr. Mahoney: The offer is objected to as immaterial, in that the decision of the United States Supreme Court on the question of common law as in that case is immaterial in this case, and as being incompetent, and that the decisions of that court are not the proper methods of proving the laws of the United States. There being no objection on the ground of the identification of the offer as to its being in fact a correct report of the decisions of the United States Supreme Court.

The Court: The objection is overruled.

To which ruling of the court the plaintiff, by his counsel, excepted.

The same is received and read in evidence, a copy of which is as follows:

359 CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY

v.

LATTA.

Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

No. 231. Argued March 8, 1912; Reargued October 22, 23, 1912.

Decided January 6, 1913.

Decided on Authority of Adams Express Company v. Croninger, ante, p. 491, and C., B. & Q. Ry. v. Miller, ante, p. 513.

172 Fed. Rep. 850, reversed.

The facts, which involve the validity under the Carmack Amendment of schedules of tariff rates based upon the values, and the extent of the liability of carriers under bills of lading, are stated in the opinion.

Mr. James B. Sheean for petitioner.

Mr. H. C. Brome for respondent.

Mr. Justice LURTON delivered the opinion of the court.

This was an action to recover the full value of two horses lost in the course of interstate transportation.

The defense in substance was that the plaintiff had declared the value of each of the animals to not exceed one hundred dollars, and had signed a shipping contract wherein he agreed that that was the value and that the company's liability in case of loss or damage should not exceed the agreed value. It was also shown that the schedule of tariff rates was based upon values and that a higher rate was allowable if a higher value had been declared. It was
360 claimed that a limitation of liability made for the purpose of obtaining the lower of alternative rates was admissible under the provisions of §20 of the Interstate Commerce Act of June 29, 1906, 34 Stat. 584, c. 3591.

The circuit court instructed a verdict for the agreed value, ruling that the contract was valid and was controlled by the Interstate Commerce Acts. The Circuit Court of Appeals reversed this judgment, upon the ground that the contract was invalid under the constitution of the State of Nebraska, and held the plaintiff entitled to recover the full value of the animals. 172 Fed. Rep. 850. The case was remanded to the Circuit Court, where in pursuance of the judgment and opinion of the Circuit Court of Appeals, the jury was instructed that it should find the actual value of the animals lost and return a verdict for that amount. Upon a second writ of error this judgment was affirmed by the Circuit Court of Appeals, and the case has come to this court upon a writ of certiorari.

The case is governed by the cases of Adams Express Company v. Croninger, and C., B. & Q. Ry. v. Miller, both just decided.

Judgment reversed and the case is remanded for a new trial.

361 Mr. Herdman: The defendant offers in evidence the decision of the Supreme Court of the United States in the case of Missouri, Kansas & Texas Railway Company vs. Harriman, as reported in Volume 227 of the Official Reports of the decisions of the Supreme Court of the United States, on pages 657 to 673 inclusive of said volume.

Mr. Mahoney: The offer is objected to as immaterial, in that the decision of the United States Supreme Court on the question of common law as in that court is immaterial in this case. And further as incompetent, and that the decisions of that court are not the proper methods of proving the laws of the United States. There being no objections on the ground of identification of the offer as to its being in fact a correct report of the decisions of the United States Supreme Court.

The Court: The objection is overruled.

To which ruling of the court the plaintiff, by his counsel, excepted.

The same is received and read in evidence, a copy of which is received and read in evidence as follows:

362 227, U. S. 657.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY

v.

HARRIMAN.

Error to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas.

No. 121. Argued January 20, 1913. Decided March 10, 1913.

Adams Express Co. v. Croninger, 226 U. S. 491, and Kansas City Southern Ry. v. Carl, ante, p. 639, followed to the effect that the shipper who values his goods for the purpose of obtaining the lower of two duly published rates, based on valuation, is estopped from recovering a greater amount than his own valuation; and that the Carmack Amendment to the Hepburn Act of 1906 expresses the policy of Congress on this subject and supersedes all state legislation thereon.

It is not unreasonable and in fact is the method approved by the Interstate Commerce Commission, in graduating freight according to value, to divide the particular subject of transportation into two classes—those above and those below a fixed amount; and the establishment of two cattle rates, one based on a maximum fixed value and the other on the actual value, is not a violation of the Carmack Amendment of the Hepburn Act.

The Carmack Amendment has withdrawn the determination of validity of all stipulations in interstate shipping contracts from state law and legislation. Under that amendment the validity of a provision that suit must be brought within a specified period is a Federal question to be settled by the general common law.

The liability imposed by the Carmack Amendment is
363 that of the common law and it may — limited or qualified by a special contract with the shipper limiting it in a just and reasonable manner except exemption from loss or responsibility due to negligence; and so held as to a stipulation that suit be brought within ninety days from the happening of the loss.

Limitation of the time within which to bring actions is a usual and reasonable provision and there is nothing in the policy of the Carmack Amendment that is violated thereby.

The facts, which involve the validity under the Carmack Amendment of a contract for interstate shipment of live stock and a provision therein fixing the valuation of the shipment in case of loss in consideration of a lower rate, are stated in the opinion.

Mr. Alex. S. Coke, Mr. Joseph Bryson and Mr. Cecil H. Smith for plaintiff in error submitted;

Under the act to regulate commerce a carrier may fix its rates with reference to its liability, or the time within which suit shall be brought, in case of loss or damage, increasing the rates where the liability is that fixed by common law or the time for filing it is long and reducing them where the liability is limited or the time within which to sue is short.

Where tariffs duly issued, filed and published contain two rates for the shipment of cattle, one based upon the carrier's common-law liability with the statutory period for filing suit and the other
364 based upon a limited liability with a time less than that prescribed by the statute for suing, such provisions are binding upon the carrier and the shipper and must be observed by them both in the collection and payment of charges and in the adjustment of loss and damage claims.

Kansas City So. Ry. Co. v. Albers Comm. Co., 223 U. S. 573; N. Y., N. H. & H. R. R. v. Int. Com. Comm., 200 U. S. 361, 391; Armour Packing Co. v. United States, 209 U. S. 56; Tex. & Pac. Ry. Co. v. Mugg, 202 U. S. 242; Louisville & Nash. R. R. Co. v. Motley, 219 U. S. 467; Chi. & Alt. R. R. Co. v. Kirby, 225 U. S. 155; Texas & P. R. Co. v. Abilene Cotton Oil, 204 U. S. 426.

The courts, whether state or Federal, have no power to declare unreasonable rates, rules or regulations specified by a carrier in its tariffs unless the matter shall first have been presented to the Interstate Commerce Commission. Texas & P. Ry. Co. v. Abilene Cotton Oil Co., supra; Robinson v. Balto. & O. R. R. Co., 222 U. S. 506; B. & O. R. R. Co. v. Pitcairn Coal Co., 215 U. S. 480; Int. Com. Comm. v. Ill. Cent. Ry. Co., 215 U. S. 452; Int. Com. Comm. v. C., R. I. & P. Ry. Co., 218 U. S. 88.

Where a carrier specifies two rates on cattle in its tariffs, one based upon its common law liability and the other upon a limited liability fixed by the terms and conditions of its current live stock contract,

such live stock contract, when properly executed, is valid, and the carrier's liability must be determined by its provisions.

365 There is nothing in the Carmack Amendment forbidding the basing of rates upon limited liability or prohibiting contracts limiting liability in consideration of reduced rates.

Prior to the statute of 11 Geo. IV, and 1 Wm. IV, c. 68, it was held that a carrier who had given notice that he would not be responsible for goods of greater value than five pounds, and in some cases ten pounds, unless the value was declared at the time of shipping, and the rate paid accordingly, would not be liable at all, even for the five pounds or the ten pounds, to a shipper who shipped a package of greater value, as an ordinary package, without disclosing its real value. Gibbon v. Poynton, 4 Burr. 2298; Clay v. Willan, 1 H. Bl. 298; Izett v. Mountain, 4 East, 371; Batson v. Donovan, 4 B. & Ald. 21.

Under the statute 11 Geo. IV, and 1 Wm. IV, c. 68, which required the shipper to give notice of the value if the value exceeded ten pounds, it was held that the carrier is not liable, even if the loss happens by the gross negligence of his servants, where a parcel of greater value than ten pounds is delivered without declaring its value and paying the rate according to value. Hinton v. Dibbin, 2 Ad. & E. N. S. 646.

Long prior to the passage of the Carmack Amendment it was held that a contract fairly made, agreeing on the valuation of the property carried with the freight rate based on an assumption by the carrier of liability only to the extent of the agreed valuation even, where the loss resulted from the negligence of the carrier, would be upheld. Hart v. Pennsylvania R. R. Co., 112 U. S. 331. This rule has also been followed in Kidd v. Greenwich Insurance Co., 35 Fed.

366 Rep. 351; Calderon v. Atlas Steamship Co., 64 Fed. Rep. 874; S. C., 69 Fed. Rep. 574; The Kensington, 88 Fed. Rep. 331; Jennings v. Smith, 106 Fed. Rep. 139; Saunders v. Southern Railway, 128 Fed. Rep. 15; Macfarlane v. Adams Express Co., 137 Fed. Rep. 982; Missouri &c. Ry. of Texas v. Patrick, 144 Fed. Rep. 632; Taylor v. Weir, 162 Fed. Rep. 585; Blackwell v. Southern Pac. Co., 184 Fed. Rep. 489; Pierce Co. v. Wells-Fargo, 189 Fed. Rep. 561; and approved in Liverpool Steam Co. v. Ph-enix Ins. Co., 129 U. S. 397, 442; Calderon v. Atlas S. S. Co., 170 U. S. 272; The Kensington, 183 U. S. 263, and Pennsylvania R. R. Co. v. Hughes, 191 U. S. 477.

For the cases in the state courts of last resort adopting the rule in the Hart Case, see Alair v. Railroad Company, 53 Minnesota, 160; Douglas Co. v. Railway Co., 62 Minnesota, 288; O'Malley v. Railway Co., 86 Minnesota, 380; Loeser v. Chicago, M. & St. P. Ry. Co., 94 Wisconsin 571; Ullman v. Chicago &c. Ry. Co., 112 Wisconsin, 150; Baltimore & Ohio Ry. Co. v. Hubbard, 72 Oh. St. 302.

The main purpose of the Carmack Amendment was to give the holder of the bill of lading a right of action against the initial carrier for loss caused by connecting carriers, but it also creates a cause of action against the initial line which is in the nature of a right created by Federal law to take the place of rights prior thereto exist-

ing under the common law or under state enactments. Atlantic Coast Line v. Riverside Mills, 219 U. S. 186; So. Pac. Ry. Co. v. Crenshaw, 63 S. E. Rep. 865.

367 The amendment has been frequently construed by state courts and by inferior Federal courts as not prohibiting agreements of the kind in question. Greenwald v. Weir, 199 N. Y. 170; Bernard v. Adams Express Co., 205 Massachusetts 254; Travis v. Wells-Fargo, 79 N. J. L. 83; P. C. & St. L. Ry. Co. v. Mitchell (Ind.), 91 N. E. Rep. 735; Larsen v. Oregon S. L. R. Co. (Utah), 110 Pac. Rep. 983; Frye v. Southern P. Ry. Co., 247 Illinois 564; Fielder v. Express Co. (W. Va.), 71 S. E. Rep. 99.

For cases under the Harter Act. 27 Stat. 445, see Calderon v. Atlas S. S. Co., 64 Fed. Rep. 874; Aff'd 69 Fed. Rep. 574; id. 170 U. S. 272.

Many states having statutory provisions restricting the right of common carriers to limit their liability by contract, nevertheless apply the rule of the Hart Case. D'Arcy v. Adams Express Co., 162 Michigan, 363; Alair v. Railroad Co., 53 Minnesota, 160; Douglas Co. v. Railway Co., 62 Minnesota, 288; Oppenheimer v. U. S. Express Co., 69 Illinois, 62; Johnson v. Richmond & D. R. Co., 39 So. Car. 55.

No law or public policy of a state can serve to set aside or change the rates, rules and regulations of a carrier affecting interstate commerce specified in its duly issued, filed and published tariffs. Mondou v. N. Y., N. H. & H. R. R. Co., 223 U. S. 1.

368 Congress has rightly assumed jurisdiction of the subject matter, and therefore state laws covering the same must yield. Souther- Ry. Co. v. Reid & Beam, 222 U. S., 444; Nor. Pac. Ry. Co. v. Washington, 22 U. S., 370; C., C. & S. F. Ry. Co. v. Hefley, 156 U. S., 98.

Congress has so taken possession of the field of interstate commerce as to render inoperative state laws governing liability where the liability is a matter of contract based upon tariff provisions, in consideration of which the shipper was given a reduced rate.

The finding of the state court that in this case there was in fact no reduction in the rate at which the cattle were to be carried and no consideration for the limitation, in the face of uncontradicted testimony showing that the plaintiff in error did have two rates for the shipment of cattle and that defendants in error obtained the benefit of the lower rate, which they could obtain only by executing the contract limiting the plaintiff in error's liability, is not binding upon this court, but it will look to the whole testimony to determine for itself what the fact is. K. C. So. Ry. Co. v. C. H. Albers Comm. Co., 223 U. S., 573.

To so construe the Carmack Amendment as to leave state regulations in force concurrently with the regulations of Congress would permit discrimination and leave uncertainty in a field where Congress clearly intended there should be no discrimination and no uncertainty. C., M. &c. Ry. Co. v. Solan, 169 U. S., 133, and Pennsylvania R. R. Co. v. Hughes, 191 U. S., 477, distinguished.

369 Defendants in error, in declaring the value of their cattle at less than their true value for the purpose of securing a

lower rate than they would have been charged had the true value been declared, were guilty of an unlawful act, under the Act to Regulate Commerce and the Elkins Act, and they cannot maintain a suit based upon such transaction. Armour Packing Co. v. United States, 209 U. S., 56; Ellison v. Adams Express Co., 245 Illinois, 410.

A transaction in violation of a penal statute cannot be the basis of judicial action, unless the statute manifests an intention not to limit its scope to the exaction of the penalty. Miller v. Ammon, 145 U. S., 421; Brown v. Tarkington, 3 Wall., 377; Hanauer v. Doane, 12 Wall., 342; The Florida, 101 U. S., 37; Gibbs v. Baltimore Gas Co., 130 U. S., 396; McMaullin v. Hoffman, 174 U. S., 639; Harriman v. Northern Securities Co., 197 U. S., 244.

Mr. William M. Williams, with whom Mr. J. A. L. Wolfe was on the frief, for defendants in error.

A carrier may fix its rates for interstate shipments with reference to the service to be performed, and may adopt rules and regulations concerning the same; but a shipper will not be bound by a contract, which is invalid and prohibited by law, simply because the rate collected is conditioned upon the signing of such void agreement. Drey & Kahn Glass Co. v. Missouri Pacific Ry. Co. (Mo. App.), 136 S. W. Rep., 757; O'Connor v. Great Northern Ry. Co. (Minn.), 136 N. W. Rep., 743; Hooker v. Boston R. Co. (Mass.), 95 N. E. Rep., 845; Adams Express Co. v. Mellinchamp (Ga.), 75 E. Rep., 600;
370 Cramer v. Chicago, R. I. & P. Ry. Co. (Iowa), 133 N. W. Rep., 387.

The Interstate Commerce Act was intended primarily to regulate rates. The chief purpose of the act was to secure uniformity of treatmeent to all, to suppress unjust discriminations and undue preferences and to prevent special and secret agreements in respect of rates for transportation. Kansas City S. R. Co. v. Albers Com. Co., 223 U. S., 573.

The record does not show that the live stock contract was ever filed with the Interstate Commerce Commission, or that any tariff sheet so filed contained the rules and regulations relied on in this case.

Defendants in error did not misrepresent the value of their cattle for the purpose of obtaining a lower freight rate than they would have secured if the true value had been known.

Upon the general and local applicatory law, the special contract, attempting to limit the carrier's liability for its own negligence, and fixing an arbitrary and unreasonable value upon the cattle, was void. There is nothing in the Interstate Commerce Act to prevent a state court from enforcing its own rules upon this subject, and a judgment based upon the state law as contained in its statutes or decisions raises no Federal question. Pennsylvania Ry. Co. v. Hughes, 191 U. S., 477; Chicago, M. & St. P. R. R. Co. v. Solan, 169 U. S., 133; Savage v. Jones, 225 U. S., 551.

For cases in the state courts as to the effect of the Interstate Commerce Act and the decision in the Hughes Case, supra, see Adams

Express Co. v. Mellinchamp, 75 S. E. Rep., 596; Southern
371 Express Co. v. Hanaw, 134 Georgia, 445; O'Connor v. Great Northern R. Co., 136 N. W. Rep., 743; Hooker v. Boston & M. R. Co., 95 N. E. Rep., 945; Louisville & N. R. Co. v. Smith, 134 S. W. Rep., 866; Cramer v. Chicago, R. I. & P. R. Co., 133 N. W. Rep., 387. See also Latta v. Chicago, St. P. & M. R. Co., 172 Fed. Rep., 850.

Mr. Justice LURTON delivered the opinion of the court.

This was an action in a state court of Texas by a shipper of cattle, under a special live stock transportation contract for a shipment from a point in Missouri to a point in Oklahoma, to recover the value of cattle killed by a negligent derailment occurring in the former state. The shipment consisted of four bulls and thirteen cows, claimed to have been very valuable "show cattle." They were all killed, and plaintiffs recovered their full value, $10,640, and this judgment was affirmed by the court below.

As the transaction was an interstate shipment the case comes here upon questions which involves the validity of certain provisions in the contract of the shipment when tested by the twentieth section of the Act to Regulate Commerce, as amended by the act of June 29, 1906 (34 Stat., 584, c. 3591).

Aside from the question of negligence, which we assume to be closed by the verdict and judgment in the state court, the defenses pressed here are, first, that the limitation of value in case of loss or damage to thirty dollars for each bull and twenty dollars for each cow, was a valid declaration of the valuation upon which the rate was based; and, second, that the action was not brought within
372 ninety days after damage sustained, both being stipulations found in the shipping contract.

Those provisions in the contract which directly relate to the questions stated are as follows:

The title at the head of the contract is,—

"Rules and Regulations for the Transportation of Live Stock.

Notice.

This Company has two rates on Live Stock."

Then follows a paragraph in these words:

"Ordinary Live Stock transported under this special contract is accepted and hauled at rate named below at Owner's risk, as per conditions herein set forth, with the distinct understanding that said rate is a special rate, which is hereby agreed to, accepted and understood to be at less than published tariff rate applying thereon when transported at carrier's risk.

"All kinds of Live Stock, Carrier's Risk, will be taken under the provisions and at rates provided for by existing tariffs and classification."

Then follows the contract described as "Special Live Stock Contract No. 4, Executed at Pilot Grove Station, 1-30-1907."

Passing over a number of provisions concerning the agreement upon the part of the carrier, and a number of things which the shipper assumes to do, we come to §8, which is in these words:

"8. The carrier does not ship live stock or Emigrant Outfit under this character or at the rate hereon given upon which its lia-
373 bility in case of any loss or injury shall exceed the following prices per head:

Each horse, (Gelding, mare, stallion, mule or jack)	$100.00
Each pony or range horse	30.00
Each ox, steer or bull	30.00
Each cow	20.00
Each calf or hog	7.00
Each sheep or goat	2.00

"Emigrant outfit (not live stock) consisting of Emigrant Movable, Household Goods, Second-hand Farm Machinery, etc., when loaded with live stock, as per classification at valuation not to exceed $5.00 per 100 pounds in case of loss or damage, and said shipper represents and agrees that his said live stock or emigrant outfit do not exceed in value those prices, and in case of any loss or damage thereto, by carrier's negligent transportation, or handling of said cars as aforesaid, it is mutually agreed, in consideration of the rate named, and which is less than the rate applying on shipments at carrier's risk, the shipper shall be entitled to recover only actual damages, but in no instance more than the stipulated valuation shown above."

The provision of the published tariff sheet referred to in the contract as set out in the margin, preceded by *by* the offer of counsel to file it in evideence.[1]

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[1]Mr. Head: We offer the following portions of I. C. C. tariff No. A-1636, M. K. & T. Local Distance Tariff No. 2548 applying on classes and commodities:

374 Missouri, Kansas & Texas Railway Co.

The 'Katy' Route.

Long Distance Tariff No. 2548.

(Cancels No. 737.)

Applying on classes and commodities between stations on the Missouri, Kansas & Texas Ry. as follows:

Between Stations in	And Stations in
Indian Territory	Oklahoma Territory
Missouri or Kansas	Indian Territory
Missouri or Kansas	Oklahoma Territory

And locally between Stations in the Indian or Oklahoma Territories.

Rates in Cents per 100 lbs.

Cattle (See Rule 3).

Distance	Commodities	Carloads
380 miles and over 370	——	26½

Rule 3.

Live Stock—Continued.

Limitation of Liability.—Rates provided on Live Stock will apply only on shipments made at Owner's Risk, with limitation of liability on the part of the railroad company as common carrier under the terms and conditions of the current Live Stock contract provided by this company, the contract to be first duly executed in manner and form provided therein.

120 per cent of the rates named in this tariff will be changed on shipments made without limitations of carrier's liability at
375 common law and under this status, shippers will have the choice of executing and accepting contracts for shipments of Live Stock with or without limitation of liability, the rates to be made as provided herein.

By a clause in the ninth section of the contract under which the cattle were shipped it is stipulated that "no suit shall be brought against any carrier, and only against the carrier on whose line the injuries occur, after the lapse of 90 days from the happening thereof, any statute or limitation to the contrary notwithstanding."

In respect of the two stipulations just referred to, the trial judge charged the jury as follows:

"The contract of shipment in this case contains among other things, a stipulation that suit for any damages growing out of this shipment must be commenced within ninety days. You are instructed that such stipulation is void and not binding upon the plaintiffs herein.

"Said contract also contains a stipulation to the effect that if the cattle in the shipment are lost or killed, that their owners can only recover a certain fixed amount, which amount is named in said contract. You are instructed that such stipulation is void and not binding upon plaintiffs in this case, and if you should find for plaintiffs, you will fix the amount of their damages under instructions hereinafter given you."

This charge was approved upon appeal and the judgment affirmed. The ground upon which the charges in respect to the limitation of recovery in case of loss based was first, that every such contract, where the loss was due to negligence, was null and void under
376 the law and public policy of the state; and, second, that it was a contract of exemption forbidden by the Hepburn Act of June 29, 1906, being the Carmack Amendment of the twentieth

section of the general act to regulate commerce of February 4, 1887. (24 Stat. 379, c. 104.)

That the shipper had the choice of two rates, one twenty per cent higher than the other, upon this shipment, is shown by the provisions of the shipping contract and the tariff sheets referred to therein. That the difference between the two rates was not unreasonable, the one when the cattle were not valued and the other when their value was declared, is to be assumed from the acceptance of the rates as filed with the Commission. That the "portion" of the rate sheets in evidence does not include the "Current Live Stock Contract" referred to in the part filed, is of no vital significance. The objection was not made below. The case was proceeded with in the state court upon the hypothesis that the "Current Live Stock Contract," referred to in the "portion" of the rate sheets actually in evidence, was the live stock contract executed by the parties, and had been duly filed as part of the rate sheets. It is too late to make an objection here which, if made below, might have been remedied by filing all instead of a "portion" of the filed tariff. Texas & P. Railway v. Abilene Oil Co., 204 U. S. 426. In any event the rate sheets do provide for a choice between two rates, one with and one without a declared valuation. In one case the carrier is liable for
377 whatever loss or damage the shipper sustains and in the other its liability is limited to the valuation upon which the rate was based. The ground upon which the shipper is limited to the valuation declared is that of estoppel, and presupposes the valuation to be one made for the purpose of applying the lower of two rates based upon the value of the cattle. This whole matter has been so fully considered in Adams Express Company v. Croninger, 226 U. S. 491, and Kansas City Southern Railway Co. v. Carl, just decided, that we only need to refer to the opinions in those cases without further elaboration.

That the trial court and the Court of Civil Appeals erred in holding this stipulation null and void because forbidden by either the law or policy of the State of Texas, or by the twentieth section of the act of June 29, 1906, is no longer an open question since the decision of this court in the cases just referred to.

Nor is there anything upon the face contract, when read in connection with the rate sheets referred to therein, (of which the defendants in error were compelled to take notice not only because referred to in the contract signed by them, but because they had lawfully filed and published), which offend against the provision of the twentieth section of the act of June 29, 1906.

Neither is the valuation of the cattle at thirty and twenty dollars per head subject to impeachment as upon its face arbitrary and unreasonable. The valuation in this case was made by the consigner himself. The contract upon this points reads, "And said shipper represents and agrees that his said live stock * * *
378 do not exceed in value those prices," referring to the schedule set out immediately above that declaration. That the cattle were not other than average or ordinary cattle of no peculiar value as "show cattle", or otherwise, is indicated by the character of the

printed form of contract signed by the consignor. After reciting that the company had two rates on live stock, it proceeds, "Ordinary live stock transported under this special contract," etc.

The contract here involved is substantially identical with the contract and schedule upheld in Hart v. Pennsylvania Railroad, 112 U. S. 331, where the transportation was "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: 'If horses or mules, not exceeding two hundred dollars each. If cattle or cows, not exceeding seventy-five dollars each.

In the case at bar it has been said that the shipper was not asked to state the value, but only signed the contract handed to him and made no declaration. But the same point was made in the Hart Case, when the court said (p. 337):

"A distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the
379 'agreed valuation', the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further."

It is said that the contract in the case at bar includes a valuation of all bulls and all cows at the same sum, and that this is arbitrary and not the result of any real effort to value the particular bulls and cows to be transported. But the same objection applied to the contract in the Hart case, where horses were valued at the same maximum value and other cattle at the same fixed sum. But here, as there, it is plain that all animals, horses and other cattle, have not a fixed value, and so, the contract fixes "A graduated value according to the nature of the animals."

It is not unreasonable for the purpose of graduating freight according to value to divide the particular subject of transportation into two classes, those above and those below a fixed maximum amount. No other method is practicable, and this is a method administratively approved by the Commerce Commission.

That the value of the cattle shipped under this valuation did greatly exceed the valuation therein represented, may be true. It only serves to show that the shipper obtained a lower rate than he was lawfully entitled to have by a misrepresentation. It is neither just nor equitable that he shall benefit by the lower rate, and then recover for a value which he said did not exist, in order to obtain that rate. Having obtained a rate based upon the declared
380 value, he is concluded, and there is no room for parol evidence to show otherwise. Hart v. Pennsylvania Railroad and Kansas City &c. Railroad v. Carl, supra.

When the carrier graduates its rates by value and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation automatically determines which of the rates is the lawful rate. If he knowingly declares an undervaluation for the purpose of obtaining the lower of two published rates, he thereby obtains an advantage and causes a discrimination forbidden and made unlawful by the first section of the Elkins Act of February 19, 1903 (32 Stat. 847, c. 708). Texas & P. Railway v. Mugg, 202 U. S. 242; Chicago & A. Railway v. Kirby, 225 U. S. 155. The particular cattle were loaded by the shipper and were seen by the company's agent. Neither was it claimed that he was informed of the value or quality of the cattle to be shipped. We see no ground upon which this contract can be held upon its face to have offended against the statute.

The court below held that the stipulation in the shipping contract that no suit shall be brought after the lapse of ninety days from the happening of any loss or damage, "any statute or limitation to the contrary nowithstanding," was void.

It is conceded that there are statutes in Missouri; the State of the making of the contract, and the state in which the loss and the damage occurred, and in Texas, the State of the forum, which declares contracts invalid which require the bringing of an action for a carrier's liability in less than the statutory period, and that
381 this action, though started after the lapse of the time fixed by the contract was brought within the statutory period of both States.

The liability sought to be enforced is the "liability" of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack Amendment of the Hepburn Act of June 29, 1906. The validity of any stipulation in such a contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed is a Federal question to be determined under the general common law, and, as such, is withdrawn from the field of state law or legislation. Adams Express Co. v. Croninger, 226 U. S. 491; Michigan Central Railroad v. Vreeland ante p. 59. The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence. Adams Express Company v. Croninger, and Michigan Central Railroad v. Vreeland, cited above; York Co. v. Central Railroad Co., 3 Wall. 107; Railroad Company v. Lockwood, 17 Wall. 357; Express Company v. Caldwell, 21 Wall. 264, 267; Hart v. Pennsylvania Railroad, 112 U. S. 331.

The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents or failure of memory. But there is nothing in
382 the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time

is not unreasonably short. That is a question of law for the determination of the court. Such stipulations have been sustained in insurance policies. Riddlebarger v. Hartford Insurance Co., 7 Wall. 386. A stipulation that an express company should not be held liable unless claim was made within ninety days after a loss was held good in Express Company v. Caldwell, 21 Wall. 264. Such limitations in bills of lading are very customary and have been upheld in a multitude of cases. We cite a few: Central Vermont Railroad v. Soper (1st C. C. A.) 59 Fed. Rep. 879; Cinn v. Ogdensburg Transit Co. (7th C. C. A.), 85 Fed. Rep. 985; Cox. v. Central Vermont Railroad, 170 Massachusetts, 129; North British &c. Ins. Co. v. Central Vermont Railroad, 9 App. Div. (N. Y.) 4, Aff'd 158 N. Y. 726. Before the Texas and Missouri Statites such special contracts, short limitations in bills of lading were held to be valid and enforceable. McCarty v. Gulf &c. Ry., 79 Texas, 33; Thompson v. Chicago &c. Ry., 22 Mo. App. 321. See cases to same effect cited in 6 Cye. p. 508. The provision requiring suit to be brought within ninety days is not unreasonable.

For the errors indicated, the judgment must be reversed for such further proceedings as may be consistent with this opinion.

Mr. Justice HUGHES concurs in the result.

Mr. Justice PITNEY dissents.

383 Mr. Herdman: The defendant offers in evidence the decision of the Supreme Court of the United States in the case of Michigan Central Railroad Company vs. Vreeland as reported in Volume 227 of the Official Reports of the Decisions of the Supreme Court of the United States, on pages 59 to 74 inclusive, of said volume.

Mr. Mahoney: The offer is objected to as immaterial in that the decision of the United — Supreme Court on the question of common — as in that court is immaterial in this case; and further as incompetent, and that decisions of that court are not the proper methods of proving the laws of the United States.

There being no objections on the ground of the identification of the offer as to its being in fact an accurate report of the decision of the United States Supreme Court.

The Court: The objection is overruled.

To which ruling of the court the plaintiff, by his counsel, excepted.

The same is received and read in evidence, a copy of which is as follows:

384 MICHIGAN CENTRAL RAILROAD

v.

VREELAND.

Error to the Circuit Court of the United States for the Northern District of Ohio.

No. 242. Argued December 4, 1912. Decided January 20, 1913.

If the constitutional questions on which the writ of error was based were not foreclosed when the writ was sued out, this court retains jurisdiction to consider other assignments of error even if the constitutional questions have meanwhile been decided in other cases adversely to plaintiff in error.

The employer's Liability Act of 1908 will not receive such a narrow interpretation as to defeat all liability because the injured employe survived the injury for a brief period.

Congress has always had power under the commerce clause of the constitution to regulate the liability of interstate carriers to their employes for injuries; but until it did act, the subject was within the police power of the States. Since the passage of the employers' Liability Act of 1908, that act is paramount and exclusive and so remains unless and until Congress shall again remit the subject to the States. Reid v. Colorado, 187 U. S. 137.

A Federal statute upon a subject exclusively under Federal control must be construed by itself and cannot be pieced out by state legislation. If a liability does not exist under the Employers' Liability Act of 1908, it does not exist by virtue of any state legislation on the same subject.

At common law the right of action for an injury to the person is extinguished by the death of the party injured whether death be instantaneous or not. As the Employer's Liability Act of 1908
385 did not provide for any such survi-val the right was extinguished by death.

At common law loss and damage may accrue and a right of action accrue to persons dependent upon one wrongfully injured; but this cause of action, except for loss of services prior to death, abates at the death.

The evident purpose, however, of Congress, in enacting the Employers' Liability Act of 1908 was to save a right of action to certain relatives dependent upon the employe wrongfully injured for the loss and financial damage resulting from his death, and there is no express or implied limitation of the liability to cases in which death was instantaneous.

This liability is for pecuniary damage only, and the statute should *should* be construed in this respect as Lord Compbell's Act has been construed, not as granting a continuance of the right the injured employe had, but as granting a new and independent cause of action.

The pecuniary loss recoverable under the Employers' Liability

Act of 1908 by one dependent upon the employe wrongfully killed must be a loss which can be measured by some standard, and does not include an inestimable loss such as that of society and companionship of the deceased or of care and advice in case of a husband for his wife.

There is no hard and fast rule by which pecuniary damages may be measured in all cases.

A minor child sustains a loss from the death of a parent of a different kind from that of wife or husband from the death of
386 the spouse; while the former is capable of definite valuation the latter is not.

In this case the judgment under the Employers' Liability Act of 1908, of damages for death of a husband who survived the injury for a brief period, is reversed, because, although the wife was entitled to maintain the action notwithstanding the death was not instantaneous, the damages were not properly estimated as the court charged the jury that they could consider the relation of husband and wife and the care and advice of the former to the latter.

The facts are stated in the opinion.

Mr. Emery D. Potter, with whom Mr. Frank E. Robson, Mr. Henry Russel and Mr. Charles P. Carroll were on the brief, for plaintiff in error.

The decision in Mondou v. Railroad Company, 223 U. S. 1, did not deprive this court of its jurisdiction to pass upon other material and substantial questions raised on this record, its jurisdiction having once rightfully vested.

For construction of the act of April 22, 1908, 35 Stat. 65; and the act of April 5, 1910, 36 Stat. 291, see Adams v. Nor. Pac. R. R., 116 Fed. Rep. 324; Alder v. Fleming, 159 Fed. Rep. 593; American R. R. Co. v. Birch, 224 U. S. 547; City v. Marfield, 63 Kansas, 794; Dolson v. L. S. & M. S. Ry., 128 Michigan, 444; Ely v. Detroit United Ry. Co., 162 Michigan, 287; Holton v. Dailey, 106 Illinois, 131; Jones v. McMillan, 129 Mich., 86; Kellow v. Central Iowa Ry. Co., 68 Iowa, 470; Mucahey v. Washburn Car Co., 145 Massachusetts, 281; Nor. Pac. R. R. v. Adams, 192 U. S. 440, 450; Nourse
387 v. Packard, 138 Massachusetts, 307; Oliver v. Street Ry. Co., 134 Michigan, 367; Railway Co. v. Clark, 152 U. S. 230; Railway Co. v. Dawson, 68 Arkansas, 1; Railway Co. v. Dixon, 179 U. S. 131; Roundtree v. Adams Exp. Co., 165 Fed. Rep. 156; Sawyer v. Perry, 88 Maine, 42; State v. Grand Trunk Elevator Co., 134 Michigan, 297; Sweetland v. R. R. Co., 117 Michigan, 329; West v. Detroit United Ry. Co., 159 Michigan, 268; see also Michigan Survival Act, p. 16 and Michigan Death Act, p. 17.

There was an error in the charge of the court to the jury as to the measure of damages. Davis v. Guaranieri, 45 Oh. St. 471; Gas Co. v. Rogers, 135 S. W. Rep. 904; Holton v. Bailey, 106 Illinois, 132; May v. R. R. Co., 62 N. J. L. 63; McHugh v. Schlosser, 159 Pa. St. 480; Nelson v. R. R. 140 Michigan, 582; Railroad Co. v. Bentz, 108 Tennessee, 670; Railroad Co. v. Johnson, 78 Texas, 536; Rail-

road Co. v. Wilson, 48 Fed. Rep. 57; Railway Co. v. Altemeier, 60 Oh. St. 10; Railway Co. v. Austin, 68 Illinois, 126; Railway Co. v. Golway, 6 App. D. C. 144; Railway Co. v. Townsend 69 Arkansas, 380; Steel v. Kurtz, 28 Oh. St. 191; Stenfelds v. Railway Co., 73 N. Y. App. Div. 494; Swift & Co. v. Johnson, 138 Fed. Rep, 867; Walker v. R. R. Co., 111 Michigan, 518; Webster's Int. Dict. 1895, see "care," "advice."

Mr. John B. Daish, with whom Mr. Joseph D. Sullivan was on the brief for defendant in error.

The constitutional questions were abandoned by the defendant below at the trial of the case, have since been abandoned in its brief on the motion to dismiss or affirm, and pending hearing of the case have been decided adversely to the contention of the railroad company.

Assuming that all the questions raised by the assignments of error are properly before and can be considered by this court, they
388 will be found upon examination to be without merit.

Unless the provisions of the particular statutes are distinctly and clearly to the contrary it is the rule of the Federal and many state courts that so long as the death of the injured party is occasioned by acts within the statute, it is immaterial whether or not the death and injury are simultaneous. Roach v. Imperial Min. Co., 7 Fed. Rep. 698; Roach v. Cons. Imp. M. Co., 7 Sawy. 224, construing Nevada law; Matz v. Chicago &c. R. Co., 85 Fed. Rep. 180, construing Missouri law; Sternenberg v. Mailhos (C. C. A.), 99 Fed. Rep. 43, construing Texas law; St. Louis &c. R. Co. v. Dawson, 68 Arkansas, 1; Murphy v. N. Y. &c. R. Co., 38 Connecticut, 184; Mallot v. Shimer, 153, Indiana, 35, construing Illinois law; Commerce v. Burlington &c. R. Co. 71 Iowa, 490; Warden v. Humeston &c. R. Co., 72 Iowa, 201; Brown v. Buffalo R. Co., 22 N. Y. 191; Perham v. Portland Elec. Co., 33 Oregon, 451; Int'l &c. R. Co. v. Kindred, 57 Texas, 491; Boyden v. Fetchbury, &c. R. Co., 70 Vermont, 125; Van Amberg v. Vicksburg &c. R. Co., 37 La. Ann. 651; Hamilton v. Morgan's L. &c. R. Co., 42 La. Ann. 824; Legg v. Britton, 64 Vermont, 652.

Of course, where states have so-called "survival acts" and a statute creating a new cause of action (as in Michigan) it would appear to be a *salutatry* rule that an administrator can recover damages under the latter statute only if death is instantaneous, and if the death is not instantaneous he can recover under the former statute. Sweetland v. Chicago &c. R. Co., 117 Michigan, 329;
389 Dolson v. Lake Shore &c. R. Co., 128 Michigan, 444; Kyes v. Valley Telephone Co., 132 Michigan, 281; Oliver v. Houghton S. R. Co., 134 Michigan, 367. Such statutes are clearly distinguishable from the one under consideration; also such statutes as exist in Maine (Sawyer v. Perry, 88 Maine, 42). In truth, the rule in Michigan and Maine seems to be and justifiably is (by reason of the language of the acts) at variance with the rule elsewhere.

To read into this act (and it is necessary so to do to sustain the propositions in the second and third assignments of error) the word "instantaneous" or "immediate" death would change the plain and unambiguous words of the statute and nullify the beneficent purposes for which it was enacted by Congress.

There was no error in the instruction that in assessing the pecuniar- damages which the widow sustained the jury might consider the relation that was sustained by husband and wife, and draw upon their experiences as men, what it would have reasonable been worth to the wife in dollars and cents, to have had during their life together, had he lived, the care and advice of her husband. Nor. Pac. R. R. Co. v. Freeman, 83 Fed. Rep. 82; Felt v. Puget Sound Co., 175 Fed. Rep. 177; Bollinger v. St. Paul & Duluth R. R. Co., 35 Minnesota, 418; Chattanooga R. R. Co. v. Clowdis (Ga.), 17 S. E. Rep. 88; Mo. Pac. Ry. Co. v. Bond, 2 Tex. Civ. App. 104.

As to the children whose parents are killed, see Tilley v. P. R. R. Co., 29 N. Y. 252; St. Louis &c. R. Co. v. Haddry, 57
390 Arkansas, 306; Stoher v. St. L. I. M. & S. Ry Co., 91 Missouri, 509; Walker v. McNiell, 17 Washington, 582.

If the care and guidance and advice of the father is of pecuniary value to the children, likewise is the care and advice of the husband of value to his wife.

Mr. Justice LURTON delivered the opinion of the court.

This was an action under the Employers' Liability Act of April 22, 1908, to recover damages for the wrongful death of the intestate, an employe in the service of the railroad company. The constitutionality of the act was drawn in question by the plaintiff in error in the court below and this afforded ground for bringing the case directly to this court. Since the allowance of the writ of error all of the constitutional questions have been decided adversely to the plaintiff in error. Mondou v. Railroad Company, 223 U. S. 1. But this does not justify our dismissing the case, since the constitutional questions which gave the right to bring it here were not foreclosed when the writ was allowed, and we, therefore, have jurisdiction to consider other assignments of error.

These relate to the construction of the act and the measure of damages thereunder. Sections 1 and 2 of the Act of April 22, 1908, 35 Stat. 65, c. 149, and § 2 of the amendatory act of April 5, 1910, 36 Stat. 291, c. 143, are set out in the margin.[1]

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[1] Sec. 1. That every common carrier by railroad while engaging in commerce between any of the several State- or Territories, or between the District of Columbia and any of the States or
391 Territories, or between the District of Columbia or any of the State- or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the

benefit of the surviving widow or husband and children of such employe and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 2. That every common carrier by railroad in the Territories, The District of Columbia, the Panama Canal Zone, or other possession of the United States shall Be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due tio ntseieglngvdfl
defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

392 Section 2 of the Act of April 5, 1910:

That said Act be further amended by adding the following section as section nine of Said Act:

Sec. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then the next of kin dependent upon such employe, but in such cases there shall be only one recovery for the same injury.
Vol. CCXXVII-5.

This case, however, involves only a construction of the act prior to the amendment referred to.

The decedeny *d*urvided h*us* injuries for several hours. His personal representative has brought this action not for the injury suffered by his intestate, but for the loss suffered by his widow as a consequence of his wrongful death.

For the railroad company it has been argued that the fact that the injured employe survived his injuries for several hours operates to extinguish its liability for both the wrongful injury and the death which ensued. The view of counsel seems to be that the act declared a single liability and constituted a cause of action in behalf of the injured parson if he survived, or in case his death was instantaneous a cause of action for the benefit of the specified dependent relatives surviving. This is a narrow interpretation of the act and would operate to defeat all liability unless the injured person should survive long enough to conduct his action to a recovery.

393 We think the act declares two distinct and independent liabilities, resting, of course, upon the common foundation

of a wrongful injury, but based upon altogether different principles. It plainly declares the liability of the carrier to its injured servant. If he had survived he might have recovered such damages as would have compensated him for his expense, loss of time, suffering and diminished earning power. But if he does not live to recover upon his own cause of action, what then? Does any right of action survive his death and pass to his representatives? This is a question which depends upon the statute.

We may not piece out this act of Congress by resorting to the local statutes of the State of procedure or that of the injury. The act is one which relates to the liability of railroad companies engaged in interstate commerce to their employes while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the states.

Prior to this act Congress had not deemed it expedient to legislate upon the subject, though its power was ample. "The subject," as observed by this court in Mondou v. Railroad Co., 223 U. S. 1, 54, "is one which falls within the police power of the State in the absence of legislation by Congress." Nashville, C. & St. L. Ry. Co. v. Alabama, 128 U. S. 96, 99. By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employes injured while engaged in interstate commerce. This exertion of power which is granted in express terms must supersede all legislation over the same subject by the States. Thus, in Gulf, Colorado & Santa Fe Ry. v. Hefley, 158 U. S. 98, 104,
394 it was said, in reference to state legislation touching freight rates upon interstate freight which conflicted with the legislation of Congress upon the same subject, that:

"Generally it may be said in respect to laws of this character that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the Nation. 'No urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.' Henderson v. New York, 92 U. S. 259, 271. 'Definitions of the police power must, however, be taken, subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.' New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 661. 'While it may be a police power in the sense that all provisions for the health, comfort and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court, that where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail.' Morgan v. Louisiana, 118 U. S. 455, 464."

395 It therefore follows that in respect of state legislation prescribing the liability of such carriers for injuries to their

employes while engaged in interstate commerce this act is paramount and exclusive, and must remain so until Congress shall again remit the subject to the reserved police power of the States. Reid v. Colorado, 187 U. S., 137, 146.

The statutes of many of the States expressly provide for the survival of the right of action which the injured person might have prosecuted if he had survived. But unless this Federal statute which declares the liability here asserted provides that the right of action shall survive the death of the injured employe, it does not pass to his representatives, notwithstanding state legislation. The question of survival is not one of procedure, "but one which depends on the substance of the cause of action." Schreiber v. Sharpless, 110 U. S., 76, 80; Martin v. Baltimore & Ohio R. R. Co., 151 U. S., 673.

Nothing is better settled than that at common law the right of action for an injury to the person is extinguished by the death of the party injured. The rule "Actio personalis moritur cum persona" applies, whether the death from the injury be instantaneous or not. The act of 1908 does not provide for any survival of the right of action created in behalf of an injured employe. That right of action was therefore extinguished. The act has been many times so construed by the Circuit Courts. We cite a few of the cases: Fulgham v. Railway, 167 Fed. Rep., 660; Walsh v. Railroad, 173 Fed. Rep., 494.

396 At common law loss and damage may, in some cases, accrue to persons dependent upon one wrongfully injured and a right of action in some cases arises in their behalf. But this cause of action, except for loss of personal services, before the death, abates at the death.

In Baker v. Bolton, 1 Campbell, 493, Lord Ellenborough ruled that "in civil court, the death of a human being could not be complained of as an injury." Mobile Life Ins. Co. v. Brame, 95 U. S., 754, 756; The Harrisburg, 119 U. S., 199, 204.

The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employe wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death. Thus after declaring the liability of the employer to the injured servant, it adds, "or in case of the death of such employe, to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next kin dependent upon such employe, for such injury or death," etc. There is no express or implied limitation of the liability to cases in which the death was instantaneous.

This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had, one proceeding upon altogether

397 different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them and for that only.

The statute in giving an action for the benefit of certain members of the family of the decedent is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being, that of 9 and 10 Victoria, known as Lord Campbell's Act. This act has been, in its distinguishing features, re-enacted in many of the states, and both in the courts of the States and of England has been construed not as operating as a continuance of any right of action which the injured person would have had, but for his death, but as a new or independent cause of action for the purpose of compensating certain dependent members of the family for the deprivation, pecuniarily, resulting to them from his wrongful death. For convenience in comparing Lord Campbell's Act with the Act of Congress of 1908, the first and second sections of the former are set out in the margin.[1]

In one of the earliest cases which arose under the act, Coleridge, J., said:

"It will be evident that this act does not transfer this right of action to his representative, but gives to the representative a totally new right of action, on different principles."

Blake v. Midland Ry. Co., 18 Q. B., 93, 109.

In Seward v. The Vera Cruz, 100 App. Cases, 59, Lord Blackburn said:

"A totally new action is given against the person who would have been responsible to the deceased *of* the deceased had lived; and action which * * * is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child, who under such circumstances suffers pecuniary loss."

But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the

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[1] Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding such death, etc.

398 The second section provides that—

Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought.

decedent immediately before his death to have maintained
399 an action for his wrongful injury. Tiffany, Death by Wrongful Act, §124; Louisville, E. & St. L. R. R. Co. v. Clark, 152 U. S., 230; Read v. G. E. Ry., L. R. 3 Q. B., 555; Hecht v. O. & M. Ry., 132 Indiana, 507; Fowlkes v. Nashville & Decatur R. R. Co., 9 Heisk., 829; Littlewood v. Mayor, 89 N. Y., 24; Southern Bell Tel. Co. v. Cassin, 111 Georgia, 575.

The distinguishing features of that act are identical with the act of Congress of 1908 before its amendment. First, it is grounded upon the original wrongful injury of the person; second, it is for the exclusive benefit of certain specified relatives; third, the damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries.

The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived. Compensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings. Tiffany, Death by Wrongful Act, §§153, 154; Illinois Cent. R. R. Co. v. Barron, 5 Wall., 90, 105, 106; Davis v. Guarhieri, 45 Ch. St., 470; Blake v. Midland Railway, cited above; Hurst v. Detroit City Railway, 84 Michigan, 539, 545; Munroe v. Pacific Dredging Company, 84 California, 515.

400 The word "pecuniary" did not appear in Lord Campbell's Act, nor does it appear in our act of 1908. But the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage.

A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially, "not only to express the character of the loss of the beneficial plaintiff which is the foundation of the recovery, but also to discriminate between a material loss which is susceptible of pecuniary valuation, an inestimable loss that of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation." Patterson Railway Accident Law, §401.

Nevertheless, the word as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation.

In Tilley v. Hudson River Railroad, 24 N. Y. 471, and 29 N. Y. 252, the court stated that "the word 'pecuniary'" was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though grievous and painful to be borne, cannot be measured or recompensed in money.
401. It excludes, also, those losses which result from the deprivation of the society and companionship, which are equally incapable of being defined by any recognized measure of damages."

To the same effect are the cases of Schaub v. Hannibal & St. J. Railway Company, 106 Missouri, 74; S. C. 16 S. W. Rep. 924, which was followed by the Circuit Court of Appeals for the Eight Circuit in Atchison &c. Ry. v. Wilson, 48 Fed. Rep. 57; Lett v. Railway, 11 Ontario App. 1; Pennsylvania Railroad v. Goodman, 62 Pa. St. 239; Railroad v. Rush, 127 Indiana, 545; Tiffany, Death by Wrongful Act, §§ 154 to 162, inclusive; Patterson, Railway Accident Law, §§401 to 406.

No hard and fast rule by which pecuniary damages may in all cases be measured is possible. In Lett v. Railway, cited above, it was said, (p. 29) in the opinion of Patterson, J. A., after a review of all the English cases construcing the act of Lord Campbell:

"That there is through them all the same principles of construction applied to the statute. Each fresh state of facts as it arose was dealt with, and furnished a further illustration of the working of the act. The paryy claiming was held to be entitled or not to be entitled, the scale of compensation acted upon by the jury was approved or disapproved, in view of the immediate circumstances; but in no case has it been attempted to decide by anticipation what are the limits beyond which the benefit of the statute can not be claimed."

The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent, "according as the action is brought for the benefit of the hus-
402 band, wife, minor child or parent of a minor child, for the loss of services or support to which the beneficiary was legally entitled, is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled."

Tiffany, Death by Wrongful Act, §§158, 160, 161, 162.

The court below instructed the jury that they could not allow damages for the grief and sorrow of the widow, or as a "balm to her feelings." They were directed to confine themselves to a proper compensation for the loss of a pecuniary benefit which would reasonably have been derived by her from the decedent's earnings. The court did not stop there, but further instructed the jury, that, "In addition to that, independent of what he was receiving from the company, his employer, it is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and draw upon your experience as men and measure, as far as you can, what it would reasonably have been worth to Mrs. Wisemiller in dollars and cents to have had, during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband." This threw the door open to the widest speculation. The jury was no longer confined to a consideration of the financial benefits which might reasonably be expected from her husband in a pecuniary way.

A minor child sustains a loss from the death of a parent, and particularly of a mother, of a kind altogether different from that of a wife or husband from the death of the spouse. The loss of
403 society and companionship, and the acts of kindness which originated in the relation and are not in the nature of serv-

ices, are not capable of being measured by any material standard. But the duty of the mother to minor children is that of nurture, and of intellectual, moral and physcial training, such as when obtained from others must be for financial compensation. In such a case it has been held that the deprivation is such as to admit of definite valuation, if there be evidence of the fitness of the parent and that the child has been actually deprived of such advantages. Tilley v. Railway Company and Lett — Ry. Co., both cited above. If the case at bar had been of such a character, the loss of "care and advice" might have been a proper matter for compensation.

Neither "care" nor "advice," as used by the court below, can be regarded as synonymous with "support" and "maintenance", for the court said it was a deprivation to be measured over and above support and maintenance. It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that in some degree that service might include as elements "care and advice." But there was neither allegation nor evidence of such loss of service, care, or advice; and yet, by the instruction given, the jury were left to conjecture and speculation. They were told to estimate the financial value of such "care and advice from their own experiences as men." These experiences which were to be the standard would, of course, be as various as their tastes, habits and opinions. It plainly left it open to the jury to consider the value of the widow's loss of the society and companionship of her husband.

404 In this part of the charge the court erred. The assignments of error are otherwise overruled. But for this error the judgment must be reversed and a new trial ordered.

Mr. Justice HOLMES concurs in the result.

Court here took a recess until 2 o'clock P. M.

2 o'clock P. M.

JOSEPH MAUCHER recalled on his own behalf, testified as follows:

Direct examination by Mr. Mahoney:

881 Q. I wish you — state whether while you were working for the circus company, in addition to the money you were to have whether you also had your board and lodging and transportation?

A. Yes, sir.

Cross-examination by Mr. Kelley:

882 Q. You stated that about a month or so ago you called on Dr. Leaver?

A. Yes, sir.

883 Q. How do you spell that?

A. L-e-a-v-e-r.

884 Q. What initials?

A. I could not tell you.
885 Q. Where is his office?
A. I could not tell you.
886 Q. How?
405 A. I could not tell you.
887 Q. You could not tell where his office is?
A. No, sir.
888 Q. Where did you visit him?
A. 24th and Leavenworth.
889 Q. Did you visit him in his office?
A. No, sir.
890 Q. Under what circumstances did you visit him?
A. Through a friend of mine I was introduced to him.
891 Q. On the street?
A. Yes, sir.
892 Q. He prescribed for you on the street?
A. Yes, sir.
893 Q. You don't know that there is no such doctor's name contained in the telephone book, do you?
A. I don't know nothing about it.
894 Q. You don't know where he resides?
A. No, sir; I was just introduced to him as Doctor Leaver.
895 Q. Did you ever state to your counsel, Mr. Mahoney, that you were examined by him?

Mr. Mahoney: That is objected to as irrelevant and immaterial. Whatever was said between counsel and his client is privileged, and not proper cross-examination.
The Court: The objection is sustained.
To which ruling of the court the defendant, by its counsel, excepted.

Mr. Kelley:

896 Q. Did he write out a prescription for you at that time?
406 A. No, sir; he told me what to do.
897 Q. Will you state what he said?

Mr. Mahoney: That is objected to as irrelevant, immaterial, not proper cross-examination calling for the advice of a physician.
The Court: The objection is sustained.
To which ruling of the court the defendant, by its counsel, excepted.

Mr. Mahoney: Now I want to offer a matter that I overlooked, a part of the official time card, which was marked as exhibit 7, attached to the stipulation which the plaintiff introduced. There is another exhibit 7 that was introduced by the defendant, this to be marked exhibit 10, being so much thereof simply as shows the schedule time of passenger train number 6, east bound, from South Bend to Richfield, and the time at South Bend and the time at Richfield.
There being no objection the same is received in evidence as follows:

"Eastward—First Class No. 6, Pas-enger to South Bend 3:02 Richfield 3:26."

Defendant rests.

Mr. Mahoney: The plaintiff in rebuttal offers in evidence the opinion and decision of the Interstate Commerce Commission of the United States in the case of No. 2548 Pat Chapelle vs. Louisville & Nashville Railroad Company.

407 No. 2636.

SAME

v.

CENTRAL OF GEORGIA RAILWAY COMPANY.

No. 2635.

SAME

v.

ILLINOIS CENTRAL RAILROAD COMPANY.

No. 2858.

SAME

v.

ATLANTIC COAST LINE RAILROAD COMPANY.

And also the opinion of the Interstate Commerce Commission of the United States in the case

No. 2548.

PAT CHAPELLE

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

as reported in the Nineteenth Volume, Interstate Commerce Commission Reports on pages 456 and 457 in said volume.

Mr. Herdman: To which the defendant objects as incompetent, irrelevant, immaterial, and for the reason that the report of decisions of the Interstate Commerce Commission are not in evidence as to what is the law of the United States of America.

The Court: For the purposes of this case I will allow them to go in and consider them read in evidence.

To which ruling of the court the defendant, by its counsel, excepted.

408 The same are received in evidence, copies of which are as follows:

No. 2548.

PAT CHAPELLE

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

No. 2636.

SAME

v.

CENTRAL OF GEORGIA RAILROAD COMPANY.

No. 2635.

SAME

v.

ILLINOIS CENTRAL RAILROAD COMPANY.

No. 2858.

SAME

v.

ATLANTIC COAST LINE RAILROAD COMPANY.

Submitted February 25, 1910. Decided June 2, 1910.

1. Minimum rates exacted for the movement of private passenger and baggage cars not found unreasonable.

2. The tents, poles, seats and other equipment of a theatrical and minstrel troupe, provided the same can be loaded into an ordinary baggage car, are held to be baggage under the rules governing the movement of private baggage and passenger cars.

409 3. In the absence of specific limitation, a private baggage car which contains a stove must be transported at the rate properly applicable to private baggage cars; the rate on combination cars is inapplicable.

(Chapelle v. L. & N. R. R. Co., Int. Com. Com. Rep. 19.)

E. C. Bradenburg for complainant.

R. Walton Moore for Atlantic Coast Line Railroad Company, Central of Georgia Railway Company, and Illinois Central Railroad Company.

W. A. Northcott for Louisville & Nashville Railroad Company.

Report of the Commission.

LANE, *Commissioner:*

Pat Chapelle is the owner and manager of a theatrical and mi-strel troupe operated under the name of "A Rabbit's Foot Company." This troupe consists of 25 to 40 members, all of whom are negroes. Owing to the fact that theaters and public halls are not generally available to theatrical organizations of this character the complainant gives many of his performances under a tent, which, with the necessary poles and seats, constitutes part of the equipment necessary for a performance. To accommodate the movement of the members of the troupe with their paraphernalia the complainant provides two cars, one a Pullman sleeper, the other a baggage car. These cars have moved on passenger trains over substantially every railroad in the south, but complainant now brings these proceedings to have his rights determined as the owner of these private cars moving over the defendant lines.

410 1. In the case against the Central of Georgia complaint is made that the carrier refuses to move these coaches upon passenger trains, but ignominiously attaches them to freight trains. The carrier's defense to this charge is that the physical condition of the baggage car did not permit it safely to be transported as a part of a passenger train, and although the sleeping car was in excellent condition it was not desirable to separate these two coaches. After an extensive hearing upon this question the Commission directed that an examination should be made of the condition of the baggage car to test the soundness of the carrier's defense. It was agreed by the complainant that he would make such repairs as were necessary to make the car entirely acceptable to the carrier, and on the latter's behalf it was stipulated that such repairs being made both the passenger and the baggage car would be moved on regular passenger trains. Examination of the car was made, and we are informed that the car has been so repaired that there is no longer objection on the part of the carrier to moving it as desired by the complainant. This cause of complaint being eliminated, no order is required from the Commission.

2. The case against the Atlantic Coast Line involves the imposition of the rate applicable to "combination cars" of $25 as a minimum charge upon the baggage car of complainant, because the car contains a stove upon which cooking for the troupe is sometimes done. The tariffs of the carriers do not in terms define a baggage car as distinguished from a combination car, and it appears that

410½ this car is generally treated by the railroads of the south as a baggage car, subject to the $10 minimum although the Atlantic Coast Line has not so regarded it. The prime purpose of this car unquestionably is to carry the baggage of the troupe, and in the absence of a specific limitation as to its use for refreshment purposes we think complainant is entitled to have this baggage car transported at the $10 minimum.

3. The case against the Louisville & Nashville and against the Illinois Central attach the right of these carriers to make an extra charge for the carrying of tents, poles, and seats when transported in the baggage car. The tariffs of the defendant provide that tents, poles, etc., used by circuses and performances out of doors shall be treated as freight, and although these articles of complainant's are loaded into and transported in the baggage car they are charged for freight. In these complaints, too, it is said that complainant is unjustly discriminated against in that his paraphernalia is charged for as freight while similar baggage of other theatrical troupes is not subjected to such charge. Such paraphernalia, we find, does not differ from much of the baggage that is transported in the baggage cars of other theatrical companies. There appears to be no difficulty whatever in loading these articles into an ordinary baggage car, and there is no transportation reason for a classification of theatrical equipment which is so intense that it turns upon the question
411 whether it is to be used in an out-of-door performance or an indoor performance. And in fact the tariffs of some of the carriers provide that the rule as to passenger and baggage cars applicable to ordinary theatrical troupes shall apply "for the movement of carnival companies, street fair aggregations, and similar amusement companies giving performances under tents or in buildings, whose freight can be handled as baggage in standard baggage cars under regular baggage rules and regulations." We are of the opinion that the rule of the rates is unreasonable, and that such rule should be amended substantially to provide that if the paraphernalia can be loaded into an ordinary baggage car it shall be moved as part of the baggage under the rules governing the movement of private baggage and passenger cars.

4. We come now to the question of the minimum rates fixed by the four defendants for the movement of the passenger and baggage cars. The rates complained of are, $25 for each passenger or combination car and $10 for a baggage car accompanying a passenger car. These are said to be unreasonably high. The Pennsylvania and the Baltimore & Ohio roads and other lines operating in Trunk Line territory provide a minimum charge of $25 for each passenger, and accompanying baggage car. They do not provide, as alleged in the complaints, a $15 minimum for a passenger car. The minimum is $25 for the passenger car with the privilege of moving a baggage car at the same time without additional charge.

412 The Commission hesitates to reduce a rate unless clearly excessive. The present is the first complaint made against this minimum charge, although extensive use is made by theatrical companies of these private car rates. Although in some other parts of the country a lower minimum is charged, the rates in the south appear to be generally on a higher basis than in other sections of the country. Upon the record we see no reason to reduce the rates at present in effect.

The carriers have raised the question in these cases as to whether they are common carriers or private carriers as to the movement of private cars. They claim that they are private carriers and may haul

a private car as they may see proper under such rules and regulations as they may make; that the Commission has no authority to either order a private car to be moved or to pass upon the question as to the reasonableness of the charges and regulations. The Commission has held in the case of Carr v. N. P. Ry. Co., 9 I. C. C. Rep., 1, that if a carrier transports "private cars of any class, it must in like manner and upon like terms transport all private cars occupied for the same or similar purposes." We do not doubt the power of the Commission to regulate the rates imposed by carriers upon the movement of private equipment. It is hardly necessary, however, in this case to enter into a full consideration of this broad question.

413 The representatives of all the carriers repeatedly stated during the hearings in these cases that there was no intention on the part of the companies they represented to unjustly discriminate against complainant; that if his cars were in good physical condition they would be moved on equal terms with the private cars of other parties. The defendant carriers will be held to a strict compliance with these representations made on their behalf. The fact that these cars are owned by a negro and are occupied by negroes does not justify the slightest discrimination against them.

Orders will be entered—

(*a*) Dismissing the complaint as to the Central of Georgia so far as the latter is charged with unjust discrimination by reason of its refusal to transport complainant's cars in its passenger trains.

(*b*) Directing the Atlantic Coast Line to charge a minimum of $10 on the baggage car of complainant accompanying his passenger car, under tariff definition of a baggage car here concerned.

(*c*) Ordering the Illinois Central and Louisville & Nashville railroad companies to transport the tents, poles, and seats and other paraphernalia of complainant as ordinary baggage under rules governing private baggage and passenger cars when such paraphernalia is of a character that may be loaded in an ordinary baggage car; and—

(*d*) Dismissing as to all carriers upon the question of the reasonableness of the minimum rates charged.

414 No. 2548.

PAT CHAPPELLE

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Submitted August 4, 1910. Decided October 10, 1910.

Petition of defendant for rehearing denied, the Commission reaffirming its right to exercise jurisdiction over private cars when used for the conveyance of amusement outfits, theatrical companies, and the like.

E. C. Bradenburg for complainant.
W. A. Northcott for defendant.

Report of the Commission on Petition for Rehearing.

LANE, *Commissioner:*

The defendant Louisville & Nashville Railroad Company has presented petition for a rehearing in this matter, asking the Commission to make a specific finding as to whether the Commission claimed to exercise jurisdiction over private cars when such cars are used for the conveyance of amusement outfits, theatrical companies, and the like. In the original opinion (19 I. C. C. Rep., 56) it was said:

We do not doubt the power of the Commission to regulate the rates imposed by carriers upon the movement of private equipment.

This was said advisedly and with full appreciation of the cases decided by the courts holding that as to the movement of circus companies a railroad was a private carrier. No decision has been rendered since the act to regulate commerce holding that as to the transportation of private cars containing theatrical companies
415 a railroad company could class itself as a private carrier which may lawfully discriminate in the transportation service which it furnishes.

A railroad makes the carriage of goods or persons a business and holds itself out to the public as ready and willing to carry "indifferently for all persons and particular class of goods or goods of any kind whatever." We can not recognize the right of the defendant to claim exemption from the provision of this law as to any service which it renders as a carrier of persons or property. If it is a private carrier as to private cars or any class of private cars, it may carry such cars free of charge or at any rate it may choose, differing and distinguishing between each party or car that it carries. Such construction of the law absolutely nullifies it as to all private equipment, whether carrying passengers or freight. A carrier may no doubt lawfully refuse to carry certain classes of private equipment, but it may not distinguish between private cars that are owned by negroes and private cars that are owned by whites, nor may it discriminate between private cars that are owned by Armour & Company and private cars of the same class that are owned by any other concern.

Petition for rehearing will be denied.

416 Both sides close.

Mr. Herdman: Comes now the defendant in open court at the close of all the testimony in the case, and moves the court to peremptorily *to* instruct the jury to return a verdict in favor of the defendant for the following reasons:

1. That the contracts in evidence as exhibits 8 and 9 are valid contracts under the laws of the United States of America, and as such constitute a complete defense in this action.

2. That the contracts in evidence as exhibits 8 and 9 are valid, lawful contracts under the laws of the State of Illinois and of Michigan, and as such constitute complete defense in this action.

3. That the contracts in evidence as exhibits 8 and 9 are valid,

binding contracts under the laws of the State of Nebraska, and such constitute a complete defense to this action.

4. That under the pleadings and law and evidence the plaintiff is not entitled to recover of and from the defendant in this action.

The Court: The motion is overruled.

To which ruling of the court the defendant, by its counsel, excepted.

Endorsed: 18721. Maucher v. C. R. I. & P. R. Co. Bill of exceptions. Supreme Court of Nebraska. Filed Jul. 22, 1914. H. C. Lindsay, Clerk.

417 And on the same day there was filed in the office of the clerk of said supreme court a certain Waiver of Notice of Appeal, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

JOSEPH MAUCHER, Appellee,

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corporation, Appellant.

Waiver of Notice of Appeal.

Comes now the appellee above named, and hereby waives the issuance and service of notice of appeal in the above case, and hereby enters his voluntary appearance in said appeal.

MAHONEY & KENNEDY,
Attorney- for Appellee.

Endorsed: No. 18721. Supreme Court of the State of Nebraska. Joseph Maucher, Appellee, v. Chicago, Rock Island & Pacific Railway Company, a corporation, Appellant. Waiver of Notice of Appeal. William D. McHugh, Att'y for Appellant. Supreme Court of Nebraska. Filed Jul. 22, 1914. H. C. Lindsay, Clerk.

And afterwards, to-wit, on the 18th day of February, 1916, there was filed in the office of the clerk of said supreme court a certain Stipulation, in the words and figures following, to-wit:

Number 18721.

JOSEPH MAUCHER, Appellee,

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

Motion.

Come now the parties to the above entitled cause, and hereby stipulate that said cause be not assigned for argument before the sitting of the court commencing on the 17th day of April, 1916, and request the court to enter an order assigning said cause for argument at said session of the court, but not earlier than the 19th.

MAHONEY & KENNEDY,
Attorney for Appellee.
W. D. McHUGH,
Attorney for Appellant.

Endorsed: Number 18721. In the Supreme Court, State of Nebraska. Joseph Maucher, Appellant, v. Chicago, Rock Island & Pacific Railway Company, Appellee. Stipulation. Supreme Court of Nebraska. Filed Feb. 18, 1916. H. C. Lindsay, Clerk. W. D. McHugh, Att'y for Defendant.

And afterwards, to-wit, on the 19th day of February, 1916, there was rendered by said supreme court and entered of record upon the journal thereof, a certain Order in the words and figures following, to-wit:

419 Supreme Court of Nebraska, January Term, A. D. 1916, Feb. 19.

No. 18721.

JOSEPH MAUCHER, Appellee,

v.

CHICAGO, R. I. & P. R. Co., Appellant.

Appeal from the District Court of Douglas County.

On stipulation of parties, it is by the court ordered that this cause be, and hereby is, assigned for hearing at the session of court commencing April 17, 1916, but not to be heard earlier during the said session than April 19, 1916.

(Signed) A. M. MORRISSEY,
Chief Justice.

And afterwards, to-wit, on the 19th day of April, 1916, the following among other proceedings were had and done in said supreme court, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1916, Apl. 19.

The following causes were argued by counsel and submitted to the Court:

No. 18721.

MAUCHER

v.

CHICAGO, R. I. & P. R. Co.

Appeal from Douglas County.

(Signed) A. M. MORRISSEY,
Chief Justice.

And afterwards, to-wit, on the 22nd day of September, 1916, there was rendered by said court and entered of record upon the journal thereof a certain Judgment, in the words and figures following, to-wit:

420 Supreme Court of Nebraska, September Term, A. D. 1916, Sept. 22.

No. 18721.

JOSEPH MAUCHER, Appellee,

v.

CHICAGO, R. I. & P. R. Co., Appellant.

Appeal from the District Court of Douglas County.

This cause coming on to be heard upon appeal from the district court of Douglas County, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, ordered and adjudged that said judgment of the district court be, and the same hereby is, affirmed at the costs of appellant, taxed at $—, for all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion by MORRISSEY, *C. J.*

SEDGWICK, *J.*, concurring separately.

(Signed) A. M. MORRISSEY,
Chief Justice.

And on the same day there was filed in the office of the clerk of said supreme court a certain Opinion by said court, pursuant to which the preceding judgment was entered, which opinion is in the words and figures following, to-wit:

421 No. 18721.

MAUCHER

v.

CHICAGO, R. I. & P. R. Co.

Opinion Filed September 22, 1916.

The contracts pleaded as a defense examined, their substance set out in the opinion and held not to relieve defendant from liability under the facts shown by the record.

422 MORRISSEY, *C. J.*:

Plaintiff brought this action against defendant to recover damages for personal injuries alleged to have been sustained in a rear-end collision on defendant's line of railroad August 12, 1913. There was a verdict for $12,500, which on motion for a new trial was reduced to $10,000, and defendant has appealed. Defendant was, and is, a railroad company engaged in general railroad business both intrastate and interstate. At the date of the injury plaintiff was an employee of a circus company known as "Barnum and Bailey Shows," but owned by Ringling Brothers, a copartnership. The day preceeding the injury the circus company gave a performance in the city of Lincoln, Nebraska, and on the evening of that day loaded its cars with its circus equipment, baggage, and paraphernalia, and its employees. The cars belonging to the circus company were attached to a locomotive engine and way-car belonging to defendant. The engine crew and train crew were made up of the regular employees of defendant. As thus made up, this circus train started for Atlantic, Iowa, where the circus company was to give an exhibition the following day. The train passed eastward over defendant's tracks and passed South Bend, an open telegraph station. Richfield, about twelve miles farther east, was the next open telegraph station, and the stretch of track between these two stations constituted a "block." Shortly after the circus train left South Bend one of defendant's regular passenger trains arrived at that station, and received a "block" restriction card, which requires the engineer to proceed at no greater speed than would permit a complete stop at any
423 time within the range of track which was open to his vision. This "block" has a number of cuts and curves. The engineer failed to obey the restriction order and, as a consequence, ran his engine into the rear end of the circus train as it pulled onto a sidetrack at Richfield. As a result of this collision plaintiff received severe and perhaps permanent injuries.

There is practically no dispute as to the facts, but defendant denies liability, relying upon certain contracts set out at length in the pleadings. One of these is a contract between the circus company and defendant, whereby defendant undertook to transport the property of the circus company, consisting of its cars and other equipment, from point to point along its line of road, including the transportation from Lincoln, Nebraska, to Atlantic, Iowa, on special time schedules and at reduced rates. The employees of the circus company were to be conveyed in the cars of the circus company in the same train with the baggage, paraphernalia and other equipment. This transportation was to be made by defendant furnishing to and for the use of the circus company the necessary locomotives, the fuel therefor, the engine and train crews and other necessary employees, and granting the right to use defendant's tracks. Among other stipulations contained were the following:

"It is expressly agreed and understood that this agreement is not made by the first party as a common carrier, but only as a hiring of said locomotives, engines and employees, and the use of its
424 railroad to the second party, for the purpose of enabling the second party to move said train between said points; that all of the said cars, coaches and trains shall be operated under the management, directions, orders and control of the second party or its agents.

"It is expressly understood and agreed that all engineers, firemen, conductors, brakemen, train dispatchers and other operators and employees, furnished by the first party, are, in the operation and movement of said cars, coaches, and trains, exclusively the employees of the second party, but all of said cars, coaches and trains shall be run according to the rules, regulations and time cards of the first party.

"It is expressly understood and agreed, in consideration of the first party hiring the use of its railway and furnishing the motive power and employees to handle the second party's cars, coaches, paraphernalia and employees, as aforesaid, and for less than it would receive if it handled said circus cars, paraphernalia, menagerie and employees, as regular freight and passengers upon its cars, and in consideration of the privilege of stopping over at the points hereinbefore designated, that the first party shall not be responsible or liable to the second party, or to any other person, partnership or corporation for any delay of any cars or trains, however caused, and whether or not arising in any way from anyone's fault or negligence, of or for any loss, damage or injury to the property or person of the second party or of anyone employed by the second party, or being upon any
425 trains or cars, hauled under this agreement or being upon any premises of the first party or connected in any way with said circus, caravan or menagerie, or with the business of the second party, or for any loss of or damage or injury to the property or person of anyone else, or of any partnership or corporation whatsoever, whether or not any such loss, damage or injury arises in any way from, or is in any degree attributable to, any fault or negligence of the first party or any of its officers, agents or employees, in or about the performance of this agreement, or the performance of the first party's

general business or in connection with the railroad or property or any duty whatsoever of the first party.

"The second party further agrees and undertakes, as a further consideration hereof, that in case of delay, loss, damage or injury, to the person or property, either of the second party or any other persons, association of persons or corporation, carried or to be carried upon any of the cars or trains herein specified or employed on or about or in connection with the same on the business of the second party, it, the said second party, will release and does hereby release the first party from all liability or claim therefor for loss, damage or injury to itself or its business or property, will indemnify and forever save harmless the first party from all claim, demand, actions, causes of action, costs, judgments and expenses, including attorney's fees, resulting from or growing out of such delays, loss, damage or personal injury, the second party hereby assuming and agreeing to defend at its own cost all such claims, demands and actions, and to satisfy and pay the same, and the second
426 party further undertakes and agrees to inform by personal notice, to each thereof, all of the persons permitted by the second party to be carried on any of said cars, coaches, and trains, under the terms of this agreement, and to advise and notify all such persons, and each thereof, that they are carried by the second party and not by the first party, and that the first party has not assumed, with respect to them or their baggage or other personal property, any of the duties and responsibilities of a carrier of passengers.

"It is a further consideration of this agreement, and the parties hereto agree, that the second party is to have sole charge of every person and of all animals and property on any car, coach or train hauled under said agreement, and the first party does not assume, and shall be under no responsibility for the safety of any of the cars, coaches, persons, animals or property on said cars, coaches and trains, in charge of the second party, or of advance agents, from any cause whatever, and the second party agrees to, and does hereby indemnify and save harmless the first party against all loss, damage or injury on account of strangers, tramps, or others riding on said cars, coaches or trains, and being injured or killed, or on account of strangers, tramps or other persons being injured or killed in the operation of said cars, coaches or trains, or in the handling, loading or unloading of cars, and will protect the first party from damages and cost incident thereto, suffered by anyone from wild, tamed or domesticated animals escaping from cars or custody, and protect the first party against all loss, damage and cost for and on
427 account of the spread or transmission of any disease to persons or animals from unloading offal or otherwise, and against any fine or penalty arising therefrom, which may be imposed against the first party by any state, municipality or other competent authority."

This contract was made in the state of Illinois, and is claimed to be valid under the laws of that state.

At the time of the injury plaintiff was an employee of the circus company, and, as such employee, was riding on this circus train

without having paid, offered to pay, or intending to pay, any transportation whatever, and his right to be thereon was due to his employment, under a contract which he had with the circus company. The train was being moved and operated over the track of defendant in pursuance of the contract heretofore partially set out.

Before entering the employment of the circus company, to-wit, June 9, 1913, plaintiff had entered into a contract in writing with the circus company, containing the following stipulations:

"Now, therefore, for valuable consideration, and in consideration of this employment, and the furnishing by first party to second party of transportation and board of the kind customary and usual in the circus business, and in consideration of special personal benefits and advantages beyond the scope of employment inuring to second party herein, the second party accepts and assumes the increased hazard of railroad travel and circus service in all particulars
428 and circumstances and hereby exempts and releases first party from all claims for injuries, accidents, sickness and damages of whatsoever nature sustained in said service, whether due to negligence (including gross negligence) of first party, their employees, agents or bosses, or the negligence of any employee or agent of any railroad company transporting first party, when said second party is travelling on or using transportation furnished by any railway company under contract with first party; and second party, recognizing said privity in railroad transportation, hereby renounces his rights as "passenger" in travelling on any railroad line while in said service, and releases all such railroad companies from claim on his part for any damage or injury whatsoever; and second party agrees to protect, indemnify and hold harmless first party and to pay to first party (and when notified to personally assume payment of) all sums which first party may be subject to pay in consequence of any claim by, or injury, sickness or death to, second party; and second party hereby releases first party from any claim he may in the future have due to or growing out of any injury received in said service either as against first party or any railroad company, hereby binding himself, his heirs, executors and assigns firmly by these presents."

Defendant pleads this contract, together with its contract, heretofore partially set out, with the circus company, and alleges that they are valid and binding upon plaintiff, and a full, adequate and complete defense to his cause of action; alleges that the transportation furnished was interstate transportation, and that the
429 contract and its construction and effect are to be determined solely by the legislation of the United States, and the public policy thereof respecting interstate carriers and interstate transportation, and defendant pleads, and relies upon, as a defense to this action, the contracts pleaded and the laws and policies of the United States in relation to interstate transportation and the carriers thereof.

Defendant further says that the engine and train crews operating the circus train on which plaintiff was riding were the employees of the circus company and not the employees of the defendants, and

points out and relies on the clause of the contract between defendant and the circus company which provides:

"The first party agrees to furnish to and for the use of the second party * * * the engineers, firemen and other employees * * * for the transportation of said circus, menagerie, employees and equipment of the second party by train * * * from * * * Lincoln, Neb'r, to Atlantic, Ia.

"It is expressly understood and agreed that all engineers, firemen, conductors, brakemen, train dispatchers and other operators and employees, furnished by the first party, are, in the operation and movement of said cars, coaches and trains, exclusively the employees of the second party, but all of said cars, coaches and trains shall be run according to the rules, regulations and time cards of the first party."

Defendant follows this with an allegation of negligence on the part of the engine crew and train crew of the circus train in
430 failing to observe and obey Rule 99 for protection against rear-end collisions such as occurred in this case, and alleges that plaintiff's injury is due to such negligence; and alleged that plaintiff by his contract made with the circus company had fully released both the circus company and the defendant from any liability for injuries he sustained.

By reply plaintiff admitted signing the contract pleaded, but alleged that he did not receive a copy or duplicate thereof, and that when he signed the same he was not aware that he was executing a release from liability of any railroad company upon whose lines he might have occasion to travel. He alleges that the contract insofar as it undertakes to relieve the defendant from liability for the injuries he received is against public policy and is void.

The assignments of error are subdivided many times, but the real contention of defendant is that under the contracts set out defendant is relieved of liability; that the court ought to have instructed a verdict in its behalf; and that it was error for the court to submit instruction No. 3, which after reciting the substance of the contracts pleaded concluded as follows:

"In this behalf you are instructed that insofar as the first contract herein mentioned provided that the agents, servants and employees furnished by the defendant to the circus company and engaged in the operation and movement of said train and cars in the transportation of said circus company's property and employees at the time referred to, were to be regarded as exclusively the
431 employees of the circus company, except the said cars and train should be run according to the rules, regulations and time card of said defendant, the same may be considered by you as valid and binding between the parties, in so far as this particular action is concerned, and you may therefore assume as a fact conclusively established that the employees aforesaid were, at all times referred to the servants and employees of the said circus company exclusively and not those of the defendant and that therefore their acts while so employed in the management, operation and control of said circus train, would be the acts of the circus company and not

those of the defendant herein, and any negligence, if any there was on the part of the said agents or employees of said circus train will not be attributable to the defendant railway company"—and lastly that the judgment is excessive.

It may be noted that in the contract between plaintiff and the circus company plaintiff renounces his rights as a "passenger," but the contract also recites that plaintiff has knowledge that the circus company has contracted with the railroad companies over whose lines they travel to hold them harmless even for their gross negligence, and that this stipulation applies especially to the plaintiff. It is also recited that such railroad company is acting as a private carrier. When we consider the language of this contract wherein plaintiff purports to recognize the railroad company as a "private carrier," and also to renounce his claim as a "passenger" it would appear that he was releasing only such claims as he would have if the railway company were rendering service as a common
432 carrier and he was being transported as a passenger. The trial court took the view that liability arose independently of the relation of carrier and passenger. Conceding that the train on which plaintiff was riding was operated by the employees of the circus company and that the train crew was then in the employ of the circus company and not in the employ of the railroad company, yet, the evidence clearly shows that passenger train No. 6, which, in violation of the rules of the company, ran into the circus train and caused the injury to plaintiff, was a train operated and controlled by the defendant company. Neither plaintiff nor any of the crew of the train on which he was riding are shown to be guilty of negligence, while the grossest negligence may be attributed to the crew of passenger train No. 6. The trial court took the view that the crew of the circus train might be regarded as the employees of the circus company and charged the jury that plaintiff could not recover unless his injuries were due to the negligence of the crew operating the other train. By his instructions he denied plaintiff the right to recover under the law of Nebraska fixing the liability of a common carrier to a passenger. Without deciding that the contract may be given this broad and liberal construction, suffice it to say, that in view of the verdict rendered and the condition of the record neither party has been prejudiced. Independently of plaintiff's rights as a passenger, if any he had, he was lawfully upon defendant's tracks and was injured by its negligence. The trial court gave the contract full force in that it recognized defendant's claim to the private character
433 of the transportation and plaintiff's renunciation of his rights as a passenger, and limited the recovery to an affirmative showing of negligence upon the part of the passenger crew.

Contracts whereby an employee is induced to waive or sign away his rights under the law should always be strictly construed. Under the construction placed upon it by the trial court, plaintiff waived his rights as a passenger and consented that the train on which he rode might be considered as a private conveyance, but "that in so far as said contracts aforesaid, or either of them undertakes to exonerate and release the defendant herein from its acts of negligence in or about

the performance of the defendant's general business in the operation of its roads and trains, and to exempt and relieve defendant from any liability for personal injury to any employee of the circus company, and particularly to the plaintiff herein, resulting from the negligence of the defendant as to the proximate cause thereof the same is void and of no effect." Instruction No. 4. The jury were told that unless the train crew in charge of passenger train No. 6 were guilty of negligence in running that train into the circus train, plaintiff could not recover. It will be seen that while the contract was not held void in toto, the court did hold, and we think properly so, that the contract did not give the defendant company the right to wantonly maim the plaintiff. He was lawfully on its right of way, if not as a passenger, he was at least a licensee.

434 It is the contention of the appellant that the circus train constituted an interstate shipment, and, therefore, these contracts must be governed by the federal law. If governed by the federal statutes at all they must fall within what is commonly known as the Carmack amendment to the Elkins law, 34 U. S. St. at Large, ch. 3591, pp. 593-595. This statute expressly provides that "no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed." By another provision of the act it is provided the shipper may for a valid consideration limit the value of his freight but he is not permitted to release the railroad entirely from liability for its negligence. The act nowhere provides that a railway company may exempt itself from liability for negligently maiming or killing any person.

"That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary. * * * The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or public enemy. But the rigor of this liability might be modified through any fair, reasonable and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the

435 right to agree upon a rate proportionate to the value of the property transported." Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. Rep. 148.

If the contracts fell within the federal statute they are void because they undertake to exempt the carrier from all liability, but this was not a contract for the transportation of a mere piece of inanimate freight. It was a contract for the transportation of a person in whose life and safety the state has an interest, and a contract which would undertake to permit his wanton destruction would be against public policy and void. It does not appear, however, that the liability of the defendant is to be governed by the federal statute. Congress has

legislated on interstate shipments as applied to freight, but the act does not reach the questions herein involved, and in the absence of action by Congress the questions must be determined by the law of Nebraska. There is no federal legislation touching the liability of railroads growing out of interstate transportation of persons. Such being the case, the law of Nebraska must be held to govern. Mondou v. New York, N. H. & H. R. Co., 223 U. S. 1, 32 Sup. Ct. Rep. 169; Southern P. R. Co. v. Schuyler, 227 U. S. 601, 33 Sup. Ct. Rep. 277; Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. Rep. 715; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 18 Sup. Ct. Rep. 488.

Having found that the federal act does not apply, and that the law of Nebraska governs, let us see what law of Nebraska applies to the facts in this case.

"Railways heretofore constructed, or that may hereafter
436 be constructed, in this state are hereby declared public highways and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state. The liability of railroad corporations as common carriers shall never be limited." Const., Art. XI, sec. 4.

"Every railroad corporation shall give to all persons and associations reasonable and equal terms, facilities and accomodations for the transportation of merchandise, produce, commodities and other property of every kind and description upon any railroad owned, leased or operated within the state, and reasonable and equal terms, service, facilities and accommodations for terminal handling of all property and commodities whatsoever." Rev. St. 1913, sec. 5978.

The Constitution declared railroads to be pubilc highways and vested in the legislature authority to regulate their operation. Under the provisions of the statute quoted every railroad is bound to give transportation on equal terms, and when it undertook to transport this train it engaged in that undertaking not as a private carrier but as a common carrier, and would have been bound to render similar service to any other shipper that might make the demand for such transportation. By sec. 6124, Rev. St. 1913, the legislature gave a definition of the term "common carrier."

The term 'common carriers' as used herein shall be taken
437 to include all corporations, companies, individuals and association- of individuals, their lessees or receivers, appointed by any court whatsoever, that may now or hereafter own, operate, manage or control any railroad, interurban or street railway line, operated either by steam or electricity or any other motive power, or part thereof, or any express company, car company, sleeping car company, freight and freight line company, telegraph and telephone companies and any other carrier engaged in the transmission of messages or transportation of passengers or freight for hire."

Perhaps the defendant company might have declined to accept the shipment in the form in which it was offered, but having

accepted it and undertaken its transportation, it automatically became a common carrier under the law of this state, and it cannot by private contract exempt itself from the obligations imposed under the Constitution and statutes. Atchison & N. R. Co. v. Washburn, 5 Neb. 117.

A common carrier cannot limit his liability so as to cover his own or his servant's negligence. Farnham v. Camden & A. R. Co., 55 Pa. St. 53.

"A railroad company operating a line of railroad in this state, is a common carrier, and cannot, under the provisions of the constitution, limit its liability as such by special agreement with a shipper." Missouri P. R. Co. v. Vandeventer, 26 Neb. 222.

"The liability of railroad corporations as common carriers shall never be limited." Const., Art. XI, sec. 4.

"A railroad company in the carriage of goods, is subject
438 to the liability of a common carrier, and must answer for all losses not occasioned by the act of God or the public enemy, and cannot in this state by special contract limit or relieve itself from this liability." St. Joseph & G. I. R. Co. v. Palmer, 38 Neb. 463. See, also, Chicago, B. & Q. R. Co. v. Curtis, 51 Neb. 442, Chicago, R. I. & P. Co. v. Collier, 1 Neb. (Unof.) 278, Union P. R. Co. v. Metcalf & Wood, 50 Neb. 452, and Omaha & R. V. R. Co. v. Crow, 47 Neb. 84. Under the Constitution and the statutes as construed by an unbroken line of decisions of this court, the defendant must be held to be a common carrier in the transportation of the circus train.

The question as to the validity of the contract between the circus company and plaintiff is not altogether a new one in this state. In Ault v. Nebraska R. Co., 82 Neb. 434, it is said that an employer "cannot by a direct contract to that effect escape liability for negligence is well settled, such contracts being against public policy. The state has an interest in the lives and healthy vigor of its citizens, which it will not allow the master to endanger by contracting against liability for his negligence endangering them." This case was followed and approved in Olson v. Nebraska Telephone Co., 83 Neb. 735. Guided by these cases we are led to the conclusion that if the contract under consideration were made in this state it would be utterly void. This leads us then to inquire what effect is to be given to a contract valid where made, but contrary to the public policy of this state although intended to be performed herein. In
Chicago, B. & Q. R. Co. v. Gardiner, 51 Neb. 70, this
439 court had before it an Illinois contract, the same state in which this contract was made, that limited the liability of the railway company, and was valid in the state where made. The court said: "The power by contract in this state to restrict the liability of a common carrier does not exist. The statement that such a restriction is illegal in this state is, therefore, a mere truism. To ask that the law of this state, on principles of comity, shall give way to the law of Illinois is to ask that the courts of this state shall sanction what by the constitution has been declared illegal and against the public policy of this commonwealth."

Again our court has said: "Our courts, as an exercise of comity, will not enforce a contract resulting from the transaction of business within this state violating the public policy thereof." Henni v. Fidelity Building & Loan Ass'n, 61 Neb. 744.

In Coleman v. Pennsylvania R. Co., 242 Pa. St. 304, the supreme court of Pennsylvania had before it a contract essentially the same as the one before us, and in disposing of the case said: "The general rule that no contract, condition, or limitation will relieve a carrier from liability to a passenger for the consequence of its own negligence, or the negligence of its servants, is not open to question, and we need not delay to cite cases in which such contracts have been held to be void as offending against public policy." See, also, Davis v. Chesapeake & O. R. Co., 122 Ky. 528, 92 S. W. 339, 5 L. R. A. n. s. 458, and Texas & P. R. Co. v. Fenwick, 34 Tex. Civ. App. 222, 78 S. W. 548.

440 Whether plaintiff were a passenger within the common acceptation of that term or not, one thing is clear, he was in a place where he had a right to be. Defendant was a common carrier and was rendering the service usually rendered by a common carrier in his transportation, and the contracts pleaded will not avail to exempt it from liability for its negligence.

Finally, we are asked to set aside this judgment because the verdict is excessive. Plaintiff suffered internal injuries, his abdomen being so severely crushed as to cause him to lose consciousness. He was removed to a hospital where he was treated by defendant's surgeon, who after an examination deemed an immediate operation imperative, and made an abdominal incision. No rupture of any vital organ was discovered, but the crushing had been so severe that the blood vessels and the membranes had been torn and lacerated. The incision was sutured and sewed up, but plaintiff continued to suffer, and vomiting continued for a period of weeks. Whether his vomiting and suffering were due entirely to the injury received or whether the operation contributed thereto may not be definitely determined, but he was confined to his bed for some time and during that period was able to take but little nourishment. After being released from the hospital he obtained a clerical position and attempted to do light work, but on account of nausea and vomiting was compelled to abandon his employement. The wound did not heal properly, and, at the time of the trial, he had a weakened and debilitated system. According to the testimony of eminent surgeons it would require a further operation before he would be able
441 to perform manual labor. That his suffering was severe and protracted is not questioned. As to whether he will ultimately recover his former vigor, there is serious question. It is said in the brief of appellee, and unchallenged by appellant, that he has already been subject to two surgical operations; he has been unable to work for any but exceedingly short periods, and is threatened with the necessity for a third surgical operation. After seeing him upon the witness-stand and hearing the testimony of the surgeons, the jury fixed his damages at $12,500. This award was reduced to $10,000 by the trial court. At the time of his injury he was a strong, robust

man, 32 years of age, with a life expectancy of more than 33 years. During the summer season while travelling with the circus he received his board and lodging and a salary of $40 per month. During the balance of the year he claims to have earned $120 per month, and it is claimed that his earnings average about $100 per month. When we consider the serious character of his injuries, the probability of his being permanently disabled, and the severe suffering he has undergone, we cannot say that the judgment is excessive, and it will not be disturbed.

Affirmed.

442 SEDGWICK, *J.*, Concurring:

The plaintiff concedes, at least for the purpose of this case, that the circus train and its attaches, including the plaintiff, were being transported by the circus company and not by the defendant, and therefore that the plaintiff was not a passenger of defendant and that the plaintiff has the burden of proof of negligence of defendant as the proximate cause of the injury. There is no dispute between the parties as to the meaning and construction of the contract. The decision of this case depends upon the question whether the plaintiff's contract to relieve the defendant from liability for its own gross negligence is valid and enforcible. Can a common carrier exempt itself from liability for its own negligence? The act of congress does not allow contracts of that kind, and the conclusion of the majority opinion is therefore right, but I do not concur in all that is said in the lengthy, and to my mind, unnecessary quotation and discussion of the contract.

443 And afterwards, to-wit, on the 18th day of October, 1916, there was filed in the office of the clerk of said supreme court a certain Stipulation, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

Case Number 18721.

JOSEPH MAUCHER, Appellee,

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

Stipulation.

Whereas, the above named appellant intends to prosecute appropriate proceedings in the Supreme Court of the United States of America for the review of the decision and judgment of this court entered in the above entitled case, and is now taking steps to that end.

It is stipulated by and between the parties, that an order be en-

dered by this court in this case, staying the issuance of its mandate herein until further order of the court.

Dated, Omaha, Nebraska, this 16th day of October, 1916.

W. D. McHUGH,
Attorney for Appellant.
MAHONEY & KENNEDY,
Attorney for Appellee.

[Endorsed:] Case Number 18721 Supreme Court State of Nebraska. Joseph Maucher, appellee, v. Chicago, Rock Island & Pacific Railway Co., appellant. Stipulation Supreme Court of Nebraska. Filed Oct. 18, 1916. H. C. Lindsay, Clerk. W. D. McHugh, Att'y for Appellant.

444 And on the same day there was rendered by said supreme court and entered of record upon the journal thereof, a certain Order in the words and figures following, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1916. Oct. 18.

No. 18721.

JOSEPH MAUCHER, Appellee,

v.

CHICAGO, R. I. & P. R. Co., Appellant.

Appeal from the District Court of Douglas County.

This cause coming on to be heard upon stipulation of parties staying issuance of mandate, was submitted to the court; upon due consideration whereof, it is by the court ordered that said stipulation be, and the same hereby is, allowed and mandate withheld until further order of this court.

(Signed.) A. M. MORRISSEY,
Chief Justice.

445 And afterwards, to-wit: on the 1st day of December, 1916, there was filed in the office of the clerk of the Supreme Court of the State of Nebraska by Chicago, Rock Island & Pacific Railway Company, a certain Petition for a Writ of Error herein, which said original petition is attached hereto and forms a part hereof.

446 In the Supreme Court of the State of Nebraska.

JOSEPH MAUCHER, Appellee,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellant.

Petition for Writ of Error.

To the Honorable Andrew M. Morrissey, Chief Justice of the Supreme Court of the State of Nebraska:

The Chicago, Rock Island and Pacific Railway Company, appellant in the above entitled cause, wherein the said Joseph Maucher is appellee and plaintiff, and said Chicago, Rock Island and Pacific Railway Company is appellant and defendant, conceiving itself aggrieved by the order and judgment made and entered by the above named court in said cause, petitions your Honor and the said court for an order allowing said Chicago, Rock Island and Pacific Railway Company to prosecute a writ of error to the Honorable, the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which this defendant and petitioner shall give and furnish upon said writ of error,
447 and that upon the giving of such security all further proceedings in the Supreme Court of the State of Nebraska in said cause be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

And your petitioner will ever pray, etcetera.

WILLIAM D. McHUGH,
Attorney for the Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error.

448 [Endorsed:] In the Supreme Court of the State of Nebraska. Joseph Maucher, Appellee, vs. Chicago, Rock Island and Pacific Railway Company, Appellant. Petition for Writ of Error. Supreme Court of Nebraska. Filed Dec. 1, 1916. H. C. Lindsay, Clerk.

449 And on the same day there was filed in the office of the clerk of said supreme court by the said Chicago, Rock Island & Pacific Railway Company, certain Assignment of Errors, which said original Assignment of Errors is hereto attached and forms a part hereof.

450 In the Supreme Court of the State of Nebraska.

JOSEPH MAUCHER, Appellee,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellant.

Assignment of Errors.

Now comes Chicago, Rock Island and Pacific Railway Company, by William D. McHugh, its attorney, and complains that error has intervened in the proceedings and judgment in that certain cause lately depending in the said Supreme Court of the State of Nebraska, wherein Joseph Maucher was plaintiff and appellee, and Chicago, Rock Island and Pacific Railway Company was defendant and appellant, and assigns the following errors committed by said court in said cause:

First. The said Supreme Court erred in holding and deciding against the contention of the said Chicago, Rock Island and Pacific Railway Company that the contracts pleaded as a defense to said action and set forth in Exhibit A and Exhibit B attached to and a part of the answer filed in said cause by said Chicago, Rock Island and Pacific Railway Company, and constituting Exhibit 8 and Exhibit 9, respectively, in the record in said cause, were not
451 valid and effective contracts under the laws of the United States, the said contracts being as follows:

EXHIBIT "A" TO ANSWER. EXHIBIT 8*O* OF RECORD.

This agreement, made and entered into this Fifth day of June A. D. 1913, at Chicago, Ill., by and between the Chicago, Rock Island & Pacific Railway Company, first party, and Barnum and Bailey Shows second party.

Witnesseth:

Whereas, The second party is the owner of a circus, caravan and menagerie, including horses, wild animals and other articles usually used in connection with and as a part of a circus and menagerie, and the paraphernalia and tents for the same, and the first party is not a common carrier thereof and cannot be required to transport the same, and

Whereas, The second party is also owner of or uses special cars expressly designed and adapted for the carriage of said circus, animals, paraphernalia, tents, etc., and certain railway passenger coaches for the transportation of the performers in said circus, and the agents and employees of the second party in and about the same, and

Whereas, The second party desires to enter into an agreement with the first party for the use of its road-bed and tracks and
452 the necessary engines, engineers and other employes of the first party, for the purpose of moving said cars, equipment

and employes of the second party from point to point where performances are to be given on the line of the railroad of the party of the first part.

Now, therefore, the parties hereto have covenanted and agreed and do hereby covenant and agree, each with the other as follows:

The first party agrees to furnish to and for the use of the second party the necessary locomotive engines, with the necessary fuel therefor, and the engineers, firemen and other employes, and the right to use its tracks for the transportation of said circus, menagerie, employes and equipment of the second party, by train of sections, to consist of 15 coaches, 5 box cars, 21 stock cars and 40 flat cars, being a total of 81 cars, from Watertown, S. D., to Davenport, Ia., with the privilege of stopping for exhibition at the following places on the line of said railroad between said points, to wit:

To be received empty from the M. & St. L. Road and moved; Watertown, S. D., to Sioux Falls, S. D., about midnight 8/2/13 and be delivered empty (or loaded) to the I. C. R. R. at Sioux Falls. Thence to be received empty from the C. B. & Q. and moved:

453 Lincoln, Nebr., to Atlantic, Ia., about midnight 8/11/13
Atlantic, Ia., to Des Moines, Ia., " " 8/12/13
Des Moines, Ia., to Ottumwa, Ia., " " 8/13/13

and be delivered empty to the C. B. & Q. R. R.

Thence to be received empty from I. C. R. R. at Cedar Falls, Ia., and switched to Waterloo, Ia., for loading and movement to Cedar Rapids, Ia., about midnight August 21, 1913, thence moved:

Cedar Rapids, Ia., to Iowa City, Ia., about midnight 8/22/13
Iowa City, Ia., to Davenport, Ia., " " 8/23/13

and be delivered empty to the C. M. & St. P. Ry.

and from —— to —— with the privilege of stopping for exhibition at the following places on the line of said railroad between said points, to wit, ——, and to haul 3 advance advertising cars, as hereinafter stated.

All movements are to be made during the months of July & August 1913. No change shall be made in the foregoing or in the movement of cars unless ten days' notice in writing shall have been given to the first party and the first party has agreed to make such change, but in no event shall changes be made involving longer or more expensive hauls, unless for such additional compensation beyond that provided for herein as by the first party shall be deemed to be reasonable.

The second party warrants all of the said cars and coaches
454 to be furnished by it as aforesaid, to be in good condition and running order, and hereby agrees, at his or its own cost and expense, to keep same in like good condition and running order, and to this end furnish the men necessary to regularly and properly inspect said cars and coaches, to provide for proper oiling and to make all needful repairs thereof, and to indemnify and save harmless the first party against loss of damage resulting from any defects

in said cars or coaches, or from overloading cars, or from the negligence of the second party or any of his or its employes, including those hired to it for the time by the first party, and to return all locomotives and other machinery in the condition received.

The first party may, however, for its own protection, if it so desires, itself inspect the cars and coaches used by the second party, and may cancel this agreement, if it deems such cars or coaches unsafe for use; but no act of the first party in inspecting said cars or coaches shall be understood or deemed to release the second party from any liability for loss, damage or injury that may occur by reason of the defective condition thereof or from the use thereof in any manner.

It is further agreed that the first party shall not pay mileage for the use of said cars and coaches to be used in the transporta-
455 tion of the second party's circus, menagerie, paraphernalia, etc., and it is further agreed that if the circus, menagerie, paraphernalia, etc., are delivered to the first party in cars for which it would be liable for mileage under usual customs, the second party agrees to pay, in addition to the amounts shown below herein, such mileage as the first party may be or become liable for to the owners thereof.

The first party agrees, at each of the above points, to furnish a sufficient number of engines and employes in connection therewith to enable the second party to do all necessary switching of its cars and train. The second party agrees to diligently and sufficiently inspect all of said cars and coaches, and to this end will employ a sufficient number of competent inspectors, but such inspectors may be chosen, if the second party shall so elect, from the regular force of inspectors employed by the first party, and in that case no additional compensation shall be paid for this service to the first party.

The second party agrees, for the use of the railroad and engines of the first party, and the necessary engineers, firemen, train despatchers and other employes, to move and work such train, and in further consideration of the first party's agreements herein
456 set forth, to pay to the first party the sum of Thirty one hundred forty five Dollars (3,145.00), to be divided and paid in advance as per amounts shown herein.

From Watertown, S. D., to Sioux Falls, S. D..... From Lincoln, Nebr., to Atlantic, Ia..... From Atlantic, Ia., to Des Moines, Ia..... From Des Moines, Ia., to Ottumwa, Ia..... From Waterloo, Ia., to Cedar Rapids, Ia..... From Cedar Rapids, Ia., to Iowa City, Ia..... From Iowa City, Ia., to Davenport, Ia.....	$3,145.00

The said sum for each run to be paid before leaving each point of departure.

The second party further agrees that, on or before the first movement of its circus, car-van or menagerie, under this agreement, it

will purchase and pay therefor, at the regular published tariff rates Nine Hundred twenty (920.00) Dollars' worth of transportation over the lines of the first party, for the exclusive use of the officers, agents, employes and servants of the second party, while traveling upon the regular trains of the first party in connection with the movement of said second party's circus, caravan or menagerie hereunder or in connection with advertising the same.

The second party agrees, by means of the service, and at the sole expense of the second party, to receive its cars and coaches
457 from connecting carriers at Watertown, S. D., and to deliver the same to the connecting carriers upon the termination of this agreement at Davenport, Ia., to load and unload all of said cars and coaches and train and to have the same loaded and ready to start from each of the above designated points, at such hour as will make it necessary to run faster than ordinary safety will admit.

It is expressly agreed and understood that this agreement is not made by the first party as a common carrier, but only as a hiring of said locomotives, engines and employes, and the use of its railroad to the second party, for the purpose of enabling the second party to move said train between said points; that all of the said cars, coaches and trains shall be operated under the management, directions, orders and control of the second party or its agents.

It is expressly understood and agreed that all engineers, firemen, conductors, brakemen and train despatchers and other operators and employes, furnished by the first party, are, in the operation and movement of said cars, coaches and trains, exclusively the employes of the second party, but all of said cars, coaches and trains shall be run according to the rules, regulations and time cards of the first party.

It is expressly understood and agreed, in consideration of
458 the first party hiring the use of its railway and furnishing the motive power and employes to handle the second party's cars, coaches, paraphernalia and employes, as aforesaid, and for less than it would receive if it handled said circus, cars, paraphernalia, menagerie and employes, as regular freight and passengers upon its cars, and in consideration of the privilege of stopping over at the points hereinbefore designated, that the first party shall not be responsible or liable to the second party or to any other person, partnership or corporation, for any delay of any cars or trains, however caused, and whether or not arising from anyone's fault or negligence, or for any loss, damage or injury to the property or person of the second party or of anyone employed by the second party, or being upon any trains or cars, hauled under this agreement, or being upon any premises of the first party or connected in any way with said circus, caravan or menagerie or with the business of the second party, or for any loss of or damage or injury to the property or person of anyone else, or of any partnership or corporation whatsoever, whether or not such loss, damage or injury arises in any way from, or is in any degree attributable to, any fault or negligence of the first party or any of its officers, agents or employes, in or about the performance of this agreement, or the

performance of the first party's general business or in con-
459 nection with the railroad or property or any duty whatsoever of the first party.

The second party further agrees that it will fully comply with any and all statutes and laws, either of the United States or of any state in which the cars and coaches may be located at any time, regulating the construction or equipment, or otherwise, of cars and coaches, and agrees to indemnify and save harmless the first party from any and all loss, damage, injury, fine or penalty, or claim therefor which may occur to or be imposed against the first party, in any manner arising or growing out of any violations or violations of any such statute or law, and from all costs and expenses whatsoever incident to or connected therewith.

But, if notwithstanding this contractual exemption from liability, the first party shall be held liable in any court for any loss, damage or injury, suffered by the second party on any account, it is hereby agreed in consideration of the special undertaking of the second party and the low rate of charges that such damage shall be liquidated and stipulated not to exceed the actual value of the animals or property aforesaid, which for the purpose of this agreement, and by reason of the said special undertaking and low rate, it is by the second party stipulated, agreed and represented that in no case will exceed the sum per head for each animal as
460 follows:

Elephants, Hippopotami, Giraffes, Rhinoceroses....	$500.00 each
Horses, Zebras, Lions and Tigers.....	100.00 each
All others of the equine and feline species.....	25.00 each
Buffaloes and others of the bovine species.....	50.00 each
Seals	10.00 each
Monkeys, Crocodiles, Alligators, Serpents and other reptiles	5.00 each
Birds, all species, and other animals not enumerated.	5.00 each

It is further agreed that the value of each chariot, band wagon, calliope or other vehicle, will not exceed $100.00 and that the value of each canvas tent with center poles, ropes and paraphernalia complete, will not exceed $100.00.

The second party further agrees and undertakes, as a further consideration hereof, that in case of delay, loss, damage or injury, to the person or property, either of the second party or any other persons, association of persons or corporation, carried or to be carried upon any of the cars or trains herein specified or employed on or about or in connection with the same on the business of the second party, it, the said second party, will release and does hereby release the first party from all liability or claim therefor for loss, damage or injury to itself or its business or property, will indemnify and for ever save harmless the first party from all claims, demand, actions, causes of action, costs, judgments and expense, in-
461 cluding attorney's fees, resulting from or growing out of such delays, loss, damage or personal injury, the second party

hereby assuming and agreeing to defend at its own cost all such claims, demands and actions, and to satisfy and pay the same, and the second party further undertakes and agrees to inform by personal notice to each thereof, all of the persons permitted by the second party to be carried on any of said cars, coaches and trains, under the terms of this agreement, and to advise and notify all such persons, and each thereof, that they are carried by the *the* second party and not by the first party, and that the first party has not assumed with respect to them or their baggage or other personal property, any of the duties and responsibilities of a carrier of passengers.

It is further agreed that the second party may, at its option, furnish 3 advertising cars, carrying 25, 25 and 22 persons, employed as advance advertising agents, traveling exclusively in said cars. Advertising or other agents, traveling upon ordinary and regular trains of party of first part, shall be provided with proper and regular transportations as above provided. Said cars to be in good order and running condition, and to be equipped with Master Car Builder's Association trucks, running gears, platforms, couplers, etc., and with air brake equipment, and these advertising cars may be attached to trains of the first party, to be designated by it, and hauled
462 from Watertown, S. D., to Davenport, Ia., with the privilege of stopping and being left on the side track at any intermediate station which the second party may designate, at any time between the tenth day of July, 1913, and the twenty-third day of August, 1913, and shall be moved upon notice from the second party, as soon after notice is given as practicable, for the consideration aforesaid, and the first party shall not be liable for any damage to or loss of said cars or property therein or for injury to or death of the persons carried thereon, whether or not arising from any fault or negligence of the first party, or any of its officers, agents or employes, and the second party agrees to indemnify and save harmless the first party against any loss or damage on account of injuries to or death of persons traveling in said advertising cars, or damages on account of loss or injury to their property, and this stipulation is to be deemed and const-ued as dependent upon and forming part of the foregoing agreement.

It is a further consideration of this agreement, and the parties hereto agree, that the second party is to have sole charge of every person and of all animals and property on any car, coach or train hauled under this agreement, and the first party does not assume, and shall be under no responsibility for the safety of any of the cars, coaches persons, animals or property on said cars, coaches
463 and trains, in charge of the second party, or of advance agents, from any cause whatever and the second party agrees to, and does hereby indemnify and save harmless the first party against all loss, damage or injury on account of strangers, tramps, or other- riding on said cars, coaches or trains, and being injured or killed or on account of strangers, tramps or other persons being injured or killed in the operation of said cars, coaches or trains, or in the handling, loading or unloading of cars, and will protect the first

party from damages, and cost incident thereto, suffered by any one from wild, tamed or domesticated animals escaping from cars or custody, and protect the first party against all loss, damage and cost for and on account of the spread or transmission of any disease to persons or animals from unloading offal or otherwise, and against any fine or penalty arising therefrom which may be imposed against the first party by any State municipality or other competent authority.

The second party covenants and agrees, in consideration of the foregoing, for itself or himself, and for all of the employes or other parties or persons employed or being in or around or in connection with said circus, menagerie or the business of the second party, that in the event of any loss, damage or injury of property or persons for which, in accordance with terms, stipulations and *and* pro-
464 visions of this agreement, a cause of action may exist against the first party (It not being intended hereby in any manner to effect or restrict any such terms, stipulations or provisions, the second party for himself and for his employes and such others, will give written notice of such loss, damage or injury to some freight or station agent of the first party within thirty (30) days after the occur-ence thereof, and in such notice will state the time, place, nature, cause and amount of such loss, damage or injury. Failure on the part of second party to comply with the requirements of this paragraph shall absolutely bar and defeat any cause of action for any such loss, damage, or injury; and if such notice is given, any action for such loss, damage or injury must be brought within ninety (90) days after the occur-ence thereof, and not later any statues of limitations to the contrary notwithstanding.

The party of the second part further covenants and agrees, that if any property of the first party or property of others in its possession and control is destroyed, damaged or injured while any cars of the second party are upon the railroad of the first party, under this agreement, and such destruction, damage or injury is done or contributed to by any employe of the second party or by any person connected with said circus or menagerie, or the business of
465 the second party, then in that event the second party will reimburse the first party for such injury, damage or destruction, and for all loss, costs, expenses and recoveries on account thereof, whether or not the acts of the second party's employes, or of the persons connected with said circus, menagerie or business, which caused or contributed thereto, were done in the course of their employment in or about said circus, menagerie or business.

In witness whereof, this agreement has been executed by the parties hereto on the day and year first above written.

CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY,
By H. GOWERY, *Fright Traffic Manager.*
BARNUM & BAILEY SHOWS,
By CHAS. A. WILSON.

EXHIBIT B TO ANSWER; EXHIBIT 9 OF RECORD.

Employment Contract.

No. 22.

This agreement made at Detroit this 9th day of July, 1913, by and between Albert Ringling, Alf. T. Ringling, Chas. Ringling, John and Henry Ringling, copartners, doing business under the firm name of Barnum & Bailey, herein known as party of the first part, and Joseph Mauchard of Detroit, Mich., party of the second part.

466 Witnesseth: Expressly upon the consideration and conditions herein named, the undersigned second party accepts employment of the first party as C. H. H. and agrees to work for the first party during the season of 1913 at -20 per month. Expressly on condition that second party continuously remain in the service of first party from date of this engagement to the end of present season, the first party to encourage faithfulness among employes and efficiency in service volunteers as a gratuity to pay second party an additional $— for the last month'- service ending with the close of said circus season; but no rights whatever of second party shall vest regarding said payment, it being merely a gratuity and not affecting the salary hereinabove provided; and nothing in this clause contained shall qualify or limit the right to terminate this contract as hereinafter provided.

As evidence of good faith it is agreed that first party may retain a week's wages of second party until close of season.

It is known and understood by each party and recognized as a valuable consideration of this contract:

(*a*) That the times, manner and means of transportation incident to this employment and circus business increase the risk in travel beyond the ordinary.

467 (*b*) That the character of the service to be performed involves hazard;

(*c*) That said first party contracts with railway lines over whose tracks they travel, to save transportation companies harmless, even for gross negligence, from any and all claims, demands and damages of employes of first*y* party, and especially second party herein;

(*d*) That such contract between Railway Company as private carrier and first party, furnishes the opportunity of employment of second party.

Now therefore, for valuable consideration, and in consideration of this employment and the furnishing of first party to second party of transportation and board of the kind customary and usual in the circus business, and in consideration of special personal benefits and advantages beyond the scope of employment inuring to second party herein, the second party accepts and assumes the increased hazard of railroad travel and circus service in all particulars and circumstances and hereby exempts and releases first*y* party from all claims

for injuries, accidents, sickness and damages of whatever nature sustained in said service, whether due to negligence, (including gross negligence) of first party, their employes, agents or bosses, or the negligence of any employe of any railroad company trans-
468 porting first party; and second party, recognizing said privity in railroad transportation hereby renounces his rights as "passenger" in traveling on any railroad line while in said service, and releases all such railroad companies from claim on his part for any damage or injury whatsoever; and second party agrees to protect, indemnify and hold harmless first party and to pay to first party (and when notified to personally assume payment of) all sums which first party may be subject to pay in consequence of any claim by or injury, sickness or death to, second party; and second party hereby releases first party from any claim he may in future have due to or growing out of any injury received in said service either as against first party or any railroad company, hereby binding himself, his heirs, executors and assigns firmly by these presents.

That during said employment the services of a physician and surgeon traveling with said circus, are, so far as his time and circumstances permit, offered free of charge as a gratuity to second party; That said second party is in no manner restricted or obligated to receive said services, but may employ on his own account whomsoever he desires.

Second party agrees to faithfully perform his services under this contract, remain sober and refrain from the use of profanty
469 or improper language, obey orders of superiors and bosses under whom he serves abide by all reasonable rules and regulations of first party governing conduct of second party; and it is agreed that if at any time during the life of this contract the services of second party be or become unsatisfactory or his conduct is offensive to first party, first party has the unrestricted right, free from claim or damage, to dismiss the second party from service and terminate this contract; and said terms and provisions are hereby recognized and accepted as a condition of employment under this contract.

It is agreed that if at any time during said season second party accepts service with said circus in a line of employment differing from the present in the character of services to *by* performed or risk incident, then all the covenants to by performed or risk incident, then all the covenants herein contained (except as to salary where changed) shall obtain and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals the day and year first above written.

BARNUM AND BAILEY,
By O. STEVENS,
JOS. J. MAUCHARD.

470 Second. The said Supreme Court erred in holding and deciding, against the contentions of the said Chicago, Rock Island and Pacific Railway Company, that the validity of said con-

tracts was not to be determined and controlled by the laws of the United States.

Third. The said Supreme Court erred in holding and deciding, against the contentions of the Chicago, Rock Island and Pacific Railroad Company, that the trial court did not err in overruling the motion made by said Chicago, Rock Island and Pacific Railway Company, on the trial of said cause, that the jury be instructed to return a verdict in favor of said Chicago, Rock Island and Pacific Railway Company, said motion being as follows:

"Comes now the defendant in open court at the close of all the testimony in the case, and moves the court to peremptorily instruct the jury to return a verdict in favor of the defendant for the following reasons:

That the contracts in evidence as exhibits 8 and 9 are valid contracts under the laws of the United States of America, and as such constitute a complete defense in this action.

That the contracts in evidence as Exhibits 8 and 9 are valid, lawful contracts under the laws of the State of Illinois and of Michigan, and as such constitute complete defense in this action.

That under the pleadings and law and evidence the plaintiff is not entitled to recover of and from the defendant in this action.

Fourth. The said Supreme Court erred in holding that the said contracts did not constitute a valid defense to said action.

471 Fifth. The said Supreme Sourt erred in entering a judgment in said cause affirming the judgment of the trial court.

Sixth. The said Supreme Court erred in not entering a judgment reversing the judgment of the trial Court and directing a judgment in favor of the defendant Chicago, Rock Island and Pacific Railway Company.

Wherefore said Chicago, Rock Island and Pacific Railway Company prays that the judgment aforesaid, entered by the Supreme Court of the state of Nebraska in said action, be reversed, and said court commanded to enter a judgment in favor of the said Chicago, Rock Island and Pacific Railway Company.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
By WILLIAM D. McHUGH, *Its Attorney.*

472 [Endorsed:] In the Supreme Court of the State of Nebraska. Joseph Maucher Appellee, vs. Chicago, Rock Island and Pacific Railway Company, Appellant. Assignment of Errors. Supreme Court of Nebraska. Filed Dec. 1, 1916. H. C. Lindsay, Clerk.

473 And on the same day, to-wit: December 1, 1916, there was filed and entered of record in the journal of said supreme court, a certain Order allowing Writ of Error and fixing Supersedeas Bond in the sum of $15,000.00, which said original order allowing the writ of error and copy of journal entry of the allowance of said order, is attached hereto and forms a part hereof.

474 In the Supreme Court of the State of Nebraska.

Order Allowing Writ of Error, and Fixing Supersedeas Bond.

JOSEPH MAUCHER, Appellee,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellant.

Writ of error prayed for by petition filed this first day of December, A. D. 1916, allowed as prayed, and

It is ordered that the said Chicago, Rock Island and Pacific Railway Company give security in the sum of Fifteen Thousand Dollars ($15,000), said security, when given, to operate as a supersedeas and stay of all further proceedings in this court until the determination of the said writ of error by the Supreme Court of the United States.

A. M. MORRISSEY,
Chief Justice of the Supreme Court of the State of Nebraska.

475 [Endorsed:] In the Supreme Court of the State of Nebraska. Joseph Maucher, Appellee, vs. Chicago, Rock Island and Pacific Railway Company, Appellant. Order allowing writ and fixing supersedeas bond. Supreme Court of Nebraska. Filed Dec. 1, 1916. H. C. Lindsay, Clerk.

476 Supreme Court of Nebraska, September Term, A. D. 1916, December 1.

Appeal from the District Court of Douglas County, No. 18721.

JOSEPH MAUCHER, Appellee,

v.

CHICAGO, R. I. & P. R. Co., Appellant.

Order Allowing Writ of Error, and Fixing Supersedeas Bond.

Writ of error prayed for by petition filed this first day of December, A. D. 1916, allowed as prayed, and

It is ordered that the said Chicago, Rock Island and Pacific Railway Company give security in the sum of Fifteen Thousand Dollars ($15,000.00), said security, when given, to operate as a supersedeas and stay of all further proceedings in this court until the determination of the said writ of error by the Supreme Court of the United States.

A. M. MORRISSEY,
Chief Justice of the Supreme Court of the State of Nebraska.

Court adjourned until Saturday, December 2, 1916.

A. M. MORRISSEY,
Chief Justice.

477 And on the same day, to-wit: December 1, 1916, there was filed in the office of the clerk of said supreme court by Chicago, Rock Island & Pacific Railway Company a Supersedeas Bond in the sum of $15,000.00, which said bond was duly approved by the Chief Justice of said court, and copy of said original bond, together with the approval thereof, is attached hereto and forms a part hereof.

478 In the Supreme Court of the State of Nebraska.

JOSEPH MAUCHER, Appellee,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellant.

Bond.

Know all men by these presents:

That we, Chicago, Rock Island and Pacific Railway Company as principal, and American Surety Company of New York Surety — as surety, are held and firmly bound unto Joseph Maucher in the sum of Fifteen Thousand dollars ($15,000) to be paid to the said Joseph Maucher or his representatives, to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our, and each of our, successors, representatives and assigns firmly by these presents.

Dated this first day of December, A. D. 1916.

Whereas the above named Chicago, Rock Island and Pacific Railway Company has sued out a writ of error to the Supreme Court of the State of Nebraska to reverse the judgment in the above entitled cause, rendered by the Supreme Court of the State of Nebraska,

Now therefore, the condition of this obligation is such that if the Chicago, Rock Island and Pacific Railway Company shall prosecute said writ to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

[SEAL.] CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
By WILLIAM D. McHUGH,
Its Attorney.
AMERICAN SURETY COMPANY OF NEW YORK,
By F. M. HALL,
Attorney in Fact;
By H. S. FREEWAN,
Counter-Signer.

479 Bond approved this first day of December, A. D. 1916.

A. M. MORRISSEY,
Chief Justice Supreme Court, State of Nebraska.

Endorsed: In the Supreme Court of the State of Nebraska. Joseph Maucher, Appellee, vs. Chicago, Rock Island and Pacific Railway Company, Appellant. Bond. Supreme Court of Nebraska. Filed Dec. 1, 1916. H. C. Lindsay, Clerk.

480 And on the same day, to-wit: December 1, 1916, there was issued out of the supreme court of the United States by R. C. Hoyt, clerk of the district court of the United States for the district of Nebraska, a certain Writ of Error, which said writ of error was on said day duly allowed by the Chief Justice of the supreme court of the state of Nebraska; and on the same day said writ of error, with the allowance thereof, was filed in the office of the clerk of said supreme court of Nebraska. Said original writ of error, with the allowance thereof, is hereby attached and forms a part hereof.

481 In the Supreme Court of the State of Nebraska.

JOSEPH MAUCHER, Appellee,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellant.

Writ of Error and Order Allowing Writ.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Nebraska, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Supreme Court of the state of Nebraska before you, or some of you, that being the highest court of law or equity in said state in which a decision could be had in said suit between Joseph Maucher, plaintiff and appellee, and Chicago, Rock Island and Pacific Railway Company, defendant and appellant, wherein was drawn in question the validity, under the laws of the United States, of the contracts pleaded as a defense in said action, and wherein was drawn in question the control and effect of the laws of the United States in determining the validity of said contracts, and wherein was drawn in question the claim of the said Chicago, Rock Island and Pacific Railway Company by reason of the said contracts to a defense to the said action under the
482 laws of the United States, and the said decision was against the contentions of the said Chicago, Rock Island and Pacific Railway Company aforesaid, and manifest error has happened to

the great damage of the said Chicago, Rock Island and Pacific Railway Company, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 31st day of December, 1916, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this first day of December, 1916.

[Seal United States District Court, District of Nebraska, Lincoln Division.]

R. C. HOYT,
Clerk of the District Court of the United States for the District of Nebraska.

Allowed by Honorable Andrew M. Morrissey, Chief Justice of the Supreme Court of the State of Nebraska.

A. M. MORRISSEY,
Chief Justice of the Supreme Court of the State of Nebraska.

483 [Endorsed:] In the Supreme Court of the State of Nebraska. Joseph Maucher, Appellee, vs. Chicago, Rock Island and Pacific Railway Company, Appellant. Writ of Error and Order Allowing Writ. Supreme Court of Nebraska. Filed Dec. 1, 1916. H. C. Lindsay, Clerk.

484 And on the same day, to-wit: December 1, 1916, there was issued out of the supreme court of the state of Nebraska by A. M. Morrissey, Chief Justice thereof, a certain Citation, which said citation was on the 8th day of December, 1916, duly returned and filed in the office of the clerk of said supreme court of Nebraska, with service thereof acknowledged. Said original citation, with proof of service thereof, is hereto attached and forms a part hereof.

485 In the Supreme Court of the State of Nebraska.

JOSEPH MAUCHER, Appellee,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellant.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Joseph Maucher, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the state of Nebraska, in that cause wherein you, Joseph Maucher, are plaintiff and appellee, and the Chicago, Rock Island and Pacific Railway Company is defendant and appellant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and justice should not be done to the parties in that behalf.

Witness The Honorable Andrew M. Morrissey, Chief Justice of the Supreme Court of the state of Nebraska, this first day of December, A. D. 1916.

A. M. MORRISSEY,
Chief Justice of the Supreme Court of the State of Nebraska.

486 Due service of this citation admitted December —, 1916.

—— ——,
—— ——,
—— ——,
His Attorneys.

487 [Endorsed:] 18,721. In the Supreme Court of the State of Nebraska. Joseph Maucher, Appellee, vs. Chicago, Rock Island and Pacific Railway Company, Appellant. Citation. Supreme Court of Nebraska. Filed Dec. 8, 1916. H. C. Lindsay, Clerk.

488 In the Supreme Court of the State of Nebraska.

JOSEPH MAUCHER, Appellee,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellant.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Joseph Maucher, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the state of Nebraska, in that cause wherein you, Joseph Maucher, are plaintiff and appellee, and the Chicago, Rock Island and Pacific Railway Company is defendant and appellant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and justice should not be done to the parties in that behalf.

Witness The Honorable Andrew M. Morrissey, Chief Justice of the Supreme Court of the state of Nebraska, this first day of December, A. D. 1916.

A. M. MORRISSEY,
Chief Justice of the Supreme Court of the State of Nebraska.

489 Due service of this citation admitted December 1st, 1916.

MAHONEY & KENNEDY,
Att'ys for Joseph Maucher.
—— ——,
—— ——,
His Attorneys.

490 [Endorsed:] 18,721. In the Supreme Court, State of Nebraska. Joseph Maucher, Appellee, vs. Chicago, Rock Island & Pacific Railway Company, Appellant. Citation. Supreme Court of Nebraska. Filed Dec. 8, 1916. H. C. Lindsay, Clerk. W. D. McHugh, Att'y for Appellant.

491 And afterwards, to-wit: on the 13th day of December, 1916, there was filed in the office of the clerk of said supreme court by the said Chicago, Rock Island & Pacific Railway Company, a certain Præcipe for a transcript of the proceedings had in said case. Said original præcipe, with acknowledgment of service thereof, is hereto attached and forms a part hereof.

492 In the Supreme Court of the State of Nebraska.

JOSEPH MAUCHER, Plaintiff and Appellee,

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant and Appellant.

Præcipe.

To the Clerk of the Supreme Court of the United States:

You are hereby notified that the portions of the record of the above entitled cause to be incorporated in the transcript of the record on writ of error to the Supreme Court of the United States, are as follows:

The copy of the transcript from the District Court of Douglas County, Nebraska, the transcript of the proceedings, opinion and judgment in the Supreme Court of the state of Nebraska in said cause, and the transcript of all papers filed in said cause since the entry of the judgment in said cause in the Supreme Court of the state of Nebraska.

W. D. McHUGH,
Attorney for Chicago, Rock Island & Pacific Railway Company.

Due service of a copy of foregoing Præcipe is hereby acknowledged, this 11th day of December, 1916.

MAHONEY & KENNEDY,
Attorney for Plaintiff and Appellee.

493 [Endorsed:] No. 18721. Supreme Court of the State of Nebraska. Joseph Maucher, Pl'ff and Appellee, v. Chicago Rock Island & Pacific Railway Company, Def't and Appellant. Præcipe. Supreme Court of Nebraska. Filed Dec. 13, 1916. H. C. Lindsay, Clerk. William D. McHugh, Att'y for Def't and Appellant.

494 *Authentication of Record.*

SUPREME COURT, STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, clerk of said court, do hereby certify that the foregoing pages, numbered from 1 to 493, inclusive, are a true, full and complete transcript of the record and proceedings in the case of Joseph Maucher, plaintiff and appellee, v. Chicago, Rock Island & Pacific Railway Company, defendant and appellant, and also of the opinion of the court rendered therein as the same now appear in my office.

In testimony whereof, I have hereunto set my hand and affixed

the seal of said court at my office, in Lincoln, Nebraska, this 14th day of December, 1916.

[Seal of Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk, Supreme Court of Nebraska.

495 *Certificate of Lodgment.*

SUPREME COURT, STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, clerk of the said court, do hereby certify that there was lodged with me as such clerk on December 1, 1916, in the matter of Joseph Maucher, plaintiff and appellee, v. Chicago, Rock Island & Pacific Railway Company, defendant and appellant:—

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error, as herein set forth—one for Joseph Maucher, plaintiff and appellee, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Lincoln, Nebraska, this 14th day of December, 1916.

[Seal of Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk, Supreme Court of Nebraska.

496 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Nebraska, ss:

In obedience to the commands of the within writ, I herewith transmit to the supreme court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, as called for in the præcipe included herein, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said court of the state of Nebraska, in the city of Lincoln, this 14th day of December, 1916.

[Seal of Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk, Supreme Court of Nebraska.

Fees for Transcript.

Preparing record	132.20
Three certificates	1.50
Binding	.50
Express	.75
	134.95

Endorsed on cover: File No. 25,657. Nebraska Supreme Court. Term No. 827. Chicago, Rock Island & Pacific Railway Company, plaintiff in error, vs. Joseph Maucher. Filed December 22d, 1916. File No. 25,657.

SUBJECT INDEX.

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STATEMENT OF THE CASE 1-4

Defendant in error was injured while being transported over lines of plaintiff in error from Lincoln, Nebraska, to Atlantic, Iowa, in cars constituting part of a circus outfit. He sued plaintiff in error for damages in state court of Nebraska. The company defended among other grounds upon the claim that the circus outfit was being transported in the interstate movement under contract made with company as a private carrier, which contract released the company from liability and indemnified it from loss for injuries even though caused by negligence. This release and indemnity was in a contract between circus owners and railway company and in a contract between circus owners and defendant in error.

The company claimed that since the passage of the Carmack Amendment, the validity of these contracts was to be determined by the law as declared by this court, and that under this law the contracts were valid and constituted a complete defense to the action.

The trial court and the Supreme Court of Nebraska held against this claim and the case was brought to this court by proceedings in error.

SPECIFICATION OF THE ERRORS RELIED UPON 5-5

ARGUMENT .....

The contracts in question related to a movement in interstate commerce and fixed the rights and liabilities of the parties with respect thereto. By reason of congressional legislation, the rules and policies of the states respecting such contracts are superseded, and the validity of the agreements is to be determined by the common law rules as laid down in previous decisions of this court and adopted generally by the federal courts 6-13

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. 344.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY

Plaintiff in Error.

V.

JOSEPH MAUCHER,

Defendant in Error.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a proceeding in error to review a judgment of the Supreme Court of Nebraska.

The case is one brought by the defendant in error against plaintiff in error for damages for personal injuries. The facts, so far as they are to be considered by this court, are as follows:

In 1913, Barnum & Bailey's circus exhibited in the central western states including Nebraska and Iowa. The circus was complete—full paraphernalia, an extensive menagerie of wild animals, tents, equipment, horses, wagons, performers and employees all moved as a unit upon cars owned and provided as a part of the circus outfit.

The circus outfit was moved from point to point upon various lines of railway, the movement not being as a part

of any of the trains of the carriers, but under special conditions necessary and usual in matters of such transportation.

The owners of the circus contracted, on the fifth day of June, 1913, with the plaintiff in error, for the movement of the entire circus outfit aforesaid, from Lincoln, Nebraska, to Atlantic, Iowa. The contract was in the form usual in such cases, and the railway company entered into the same as a private carrier, and the owners of the circus not only released the railroad company from all liability for loss or damage from whatever cause, including negligence on the part of the railroad company, but also agreed to indemnify the railroad company from any loss or damage which might be sustained by reason of any damage to the person or property of any person carried or to be carried on any of the cars comprising said circus outfit.

On the 9th day of June, 1913, defendant in error was employed by the owners of the said circus under written contract by which he, in consideration of the employment, among other things, released the plaintiff in error from any liability in case of any injury received by him while being transported on said circus outfit, and to indemnify the owners of the said circus from any loss or damage by reason of any such injury.

These contracts contained the provisions usually found in such contracts. The agreements are printed in full in the appendix to this brief. These contracts and the provisions thereof releasing the claim for liability, have been held to be valid and binding by this court and federal courts generally, as will be fully shown hereafter.

The contract between the plaintiff in error and the owners of said circus, was filed with the Interstate Commerce Commission as a tariff, pursuant to the ruling of the said commission. (See Record pp. 16-17 and 131.)

In the contract so filed as a tariff, the plaintiff in error expressly reserved its legal right to insist that under the terms of the contract, it was a private carrier and did not incur any liability as a common carrier thereunder. (See Record pp. 17 and 131.)

Under this contract, and in accordance with its provisions, the caravan, menagerie, animals, paraphernalia, tents, performers, employees and cars comprising the circus outfit aforesaid, were, in the month of August, 1913, transported over the lines of the plaintiff in error from

Lincoln, Nebraska, to Atlantic, Iowa. While in the course of this movement, a collision occurred between the train comprising the circus outfit and a regular passenger train of the plaintiff in error, by reason of which the defendant in error, Joseph Maucher, received certain physical injuries.

The defendant in error thereupon brought a suit in the District Court of Douglas County, Nebraska, against the plaintiff in error, claiming damages by reason of said injury, alleging that he was a passenger on the line of said railway company and was injured through the negligence of said company.

The railway company filed its answer in said action, setting up among other things, the contracts hereinbefore mentioned, and alleging that the validity of these contracts which related to a shipment in interstate commerce, was to be determined by the law as applied by the federal courts, and that under such law, the said contracts were valid and binding and a defense to the action. (Record pp. 16-17.)

It will be noted that the contracts were for the movement of the entire circus outfit as a unit, and that the movement was between Lincoln, Nebraska, and Atlantic, Iowa, an interstate movement; hence we are dealing with contracts relating to an interstate shipment of the entire circus outfit.

Upon the trial of the case, the District Court held against this claim of the railroad company, and judgment was entered in favor of the plaintiff and against the railway company for the sum of ten thousand dollars. The case was taken by appeal to the Supreme Court of Nebraska, where the railway company again insisted that the validity of the contracts was a federal question to be determined by the law administered by the federal courts, and that under this law, the contracts were valid and constituted a defense to the action.

The Supreme Court of Nebraska considered the question, and held that even if the federal law did apply, the contracts were invalid; and it also held that the federal law did not apply in determining the validity of the contracts. (*Maucher v. Chicago Rock Island & Pacific Ry. Co.*, 100 Neb. 237, pp. 247-248 Record pp. 252-253.)

The Supreme Court of Nebraska entered a judgment affirming the judgment of the court below; the railway

company took the case to this court by proceedings in error; and the case is now here upon the claim of said company that the validity of these contracts is a matter to be determined by the law as administered by the federal courts, and that under this law, the contracts are valid and constitute a complete defense to the action.

SPECIFICATION OF THE ERRORS RELIED UPON.

1. The Supreme Court of Nebraska erred in holding and deciding against the contention of plaintiff in error that the contracts pleaded and proved as a defense to this action, were not valid and effective contracts under the law of the United States.
2. The Supreme Court of Nebraska erred in holding and deciding against the contention of plaintiff in error, that the validity of said contracts was not to be determined and controlled by the laws of the United States.
3. The Supreme Court of Nebraska erred in holding and deciding that the trial court did not err in overruling the motion made by plaintiff in error, on the trial of the cause, that the jury be instructed to return a verdict in favor of plaintiff in error on the ground that, the contracts in evidence are valid under the laws of the United States, and as such, constitute a complete defense to this action.

ARGUMENT.

I.

The contracts in question related to a movement in interstate commerce and fixed the rights and liabilities of the parties with respect thereto. By reason of congressional legislation, the rules and policies of the states respecting such contracts are superseded, and the validity of the agreements is to be determined by the common law rules as laid down in previous decisions of this court and adopted generally by the Federal courts.

The original Interstate Commerce Act did not deal with the power of railroad companies to limit or fix, by contract, their liability respecting interstate transportation. That subject was left untouched. Consequently, because of the absence of congressional action, states were free to apply their own laws and policies to all such contracts. *Pennsylvania Railroad v. Hughes*, 191 U. S. 477.

It followed, therefore, that the rule of the carriers' liability for interstate transportation was either that of the general common law as declared by this court and enforced in the federal courts throughout the United States, or that determined by the supposed public policy of a particular state, or that prescribed by the statute law or constitution of a particular state. Uniformity of rule was utterly impossible under these conditions.

Consequently, in 1906, congress passed what is known as the Carmack Amendment. This amendment bore "directly upon the carriers' liability or obligation under interstate contracts of shipment." (226 U. S. 503.) The amendment was as follows:

> "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation

company from the liability hereby imposed: *PROVIDED*, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

"That the constitutional power of congress to regulate commerce among the states and with foreign nations comprehends power to regulate contracts between the shipper and the carrier of an interstate shipment by defining the liability of the carrier for loss, delay, injury or damage to such property, needs neither argument nor citation of authority." (226 U. S. 500.)

As the power of congress to regulate contracts between shipper and carrier of interstate commerce is supreme, it necessarily follows that this power when exercised, is exclusive. When, therefore, congress by the Carmack Amendment, took up and dealt with the power of carriers to contract respecting liability in the matter of interstate shipments, that subject was thereby removed from state regulation and control, and all laws and policies of the states respecting the subject, were superseded. This has been settled by a number of decisions of this court.

The first case arising after the amendment in which the question was presented, was the case of *Adams Express Company v. Croninger*, 226 U. S. 491. In this case, it appeared that parties, in order to ship a package at a lower rate, had contracted that the value of the property was of a particular amount, and that the Express Company in the event of loss, should not be liable for more than the said agreed value.

The state court held the contract void, applying the state policy and laws. and the matter was brought to this court on proceedings in error. The Carmack Amendment did not in terms or express provision, authorize the making

of the contract binding the parties in an action for damages to the value stated. Under the provisions of the common law, however, as declared by this court and enforced in the federal courts throughout the United States before the passage of the Carmack Amendment, such a contract was held to be valid.

The question presented, therefore, was, whether the laws and policies of the state controlled in determining the validity of the contract, or whether its validity was to be determined by the provisions of the common law as applied by this court.

As the Carmack Amendment did not deal specifically and in terms with such contracts, the question whether the state laws and policies with respect to the contract were superseded, turned on the question whether, by passage of the Carmack Amendment, congress had taken under federal control, the subject of the carriers' power to contract so as to limit or fix liability in the matter of interstate shipments. This court clearly stated that under the law as it existed prior to the passage of the Carmack Amendment, state laws and policies could be applied in the determination of the validity of such contract. Citing two of its decisions illustrating the rule, the court then said (226 U. S. 503):

> "In view of the decisions of this court in the two cases last referred to, we shall assume that this case is governed by them, unless the subsequent legislation of congress is such as to indicate a purpose to bring contracts for interstate shipments under one uniform rule of law not subject to the varying policies and legislation of particular states."

The court then discussed the purpose of congress in the passage of the Carmack Amendment, and held that the object of congress in the passage of the act was "to bring contracts for interstate shipments under one uniform rule of law not subject to the varying policies and legislation of particular states."

It quotes with approval, the following language of the Supreme Court of Georgia, declaring the reason for the enactment of the amendment, and the effect thereof (p. 505):

> "Some states allowed carriers to exempt themselves from all or a part of the common law liability, by rule, regulation, or contract; others

did not; the Federal courts sitting in the various States were following the local rule, a carrier being held liable in one court when under the same state of facts he would be exempt from liability in another; hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own State, or for a carrier whose lines were extensive, to know without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one State to another. The congressional action has made an end to this diversity; for the national law is paramount and supersedes all state laws as to the rights and liabilities and exemptions created by such transaction. This was doubtless the purpose of the law; and this purpose will be effectuated, and not impaired or destroyed by the state court's obeying and enforcing the provisions of the Federal statute where applicable to the fact in such cases as shall come before them."

The effect of the Carmack Amendment is declared by this court in the following language (p. 505):

"That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist."

Having held, as above shown, that the purpose of Congress in passing the Carmack Amendment was to supersede state laws and regulations regarding contracts governing interstate transportation, this court proceeded to determine the validity of the contract made by the Express Company. As the Carmack Amendment did not, in terms, legislate upon such contracts, and as the state laws and policies were superseded, it necessarily followed that it was the common law as declared by this court, which would determine the validity of the contract under discussion. This court applied to the contract the provisions of the common law as theretofore announced by this court, and held the contract valid.

At the same time, the court decided the case of *Chicago, Burlington & Quincy Railroad Company v. Miller*, 226 U. S. 513, which was a proceeding in error to the Supreme Court of Nebraska, in a case wherein the Supreme Court of that state, after the passage of the Carmack Amendment, had applied to a contract of interstate shipment, the laws and policies of the state, and had held the contract invalid. The judgment was reversed by this court, saying (p. 518):

> "In *Adams Express Co. v. Croninger*, just decided, *ante*, p. 491, we reached the conclusion that by the provisions of sec. 20 of the latter act Congress had manifested a purpose to take possession of the subject of the liability of the carrier by railroad for interstate shipments, and that the regulations therein had superseded all state regulations upon the same subject. This case is therefore controlled by that judgment."

In *Kansas City Southern Railway Co. v. Carl*, 227 U. S. 639, this court again considering the effect of the Carmack Amendment, said (p. 649):

> "That amendment (the Carmack Amendment) undoubtedly manifested the purpose of congress to bring contracts for interstate shipments under one uniform rule or law, and therefore, withdraw them from the influence of state regulation."

In the case of *Boston and Maine Railroad v. Hooker*, 233 U. S. 97, the matter was again before this court, and the court said (p. 110):

> "Since the decision in the *Hughes Case* the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, has been passed, and this court has held that by virtue of that act (particularly

sec. 20 the Carmack Amendment) the subject of interstate transportation of property has been regulated by Federal law to the exclusion of the power of the States to control in such respect by their own policy or legislation. In this connection we may refer to the cases of *Adams Express Co. v. Croninger*, 226 U. S. 491; *Wells Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S. 469; *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639; *Missouri, Kansas & Texas Ry. Co. v. Harriman*, 227 U. S. 657."

Again in the case of *Missouri, Kansas & Texas Ry. Co. v. Harris*, 234 U. S. 412, this court said (p. 419);

"With respect to the specific effect of the Carmack Amendment (set forth in the margin), it has been held, in a series of recent cases (*Adams Express Co. v. Croninger*, 226 U. S. 491; *C. B. & Q. Railway v. Miller*, 226 U. S. 513; *Chicago, St. P. &c Ry. Co. v. Latta*, 226 U. S. 519; *Wells Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S. 469; *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639; *Missouri Kans. & Tex. Ry. Co. v. Harriman*, 227 U. S. 657; *Chicago, R. I. & Pac. Ry. Co. v. Cramer*, 232 U. S. 490; *Great Northern Ry. v. O'Connor*, 232 U. S. 508; *Boston & Maine R. R. v. Hooker*, 233 U. S. 97); that the special regulations and policies of particular States upon the subject of the carrier's liability for loss or damage to interstate shipments and the contracts of carriers with respect thereto, have been superseded."

Again in *Charleston etc. Ry. Co. v. Varnille Furniture Co.* 237 U. S. 597, this court said (p. 603):

"As was said in *Missouri Kans. & Tex. Ry. Co. v. Harris*, 234 U. S. 412, 420, the result of many recent cases, there cited, beginning with *Adams Express Co. v. Croninger*, 226 U. S. 491 and coming down through *Boston & Maine R. R. v. Hooker*, 233 U. S. 97, is that 'the special regulations and policies of particular States upon the subject of the carrier's liability for loss or damage to interstate shipments and the contracts of carriers with respect thereto have been superseded.' "

The ruling of this court was succinctly stated in the opinion in the case of *New York Central etc. R. R. Co. v. Beaham*, 242 U. S. 148, in the following language (p. 151):

> "The transactions in question related to interstate commerce; consequent rights and liabilities depend upon acts of Congress, agreement between the parties, and common law principles accepted and enforced in federal courts."

The Supreme Court of Nebraska undoubtedly misconceived the effect of the passage of the Carmack Amendment, and the decisions of this court in which such effect has been repeatedly declared. The Nebraska Court held that if the federal law did apply, the contract was void because the Carmack Amendment provided that no contract should exempt common carriers from the liability thereby imposed. And the court further held that the federal law did not apply, and state regulations did govern, because the Carmack Amendment related only to freight. (*Maucher v. Chicago Rock Island & Pacific Ry. Co.*, 100 Neb. 237; Record p. 246.)

The Nebraska court conceived that the Carmack Amendment controlled only in the particular matters specifically provided for by that amendment. The error of the court was in failing to appreciate the fact that the Carmack Amendment dealt generally with the power of carriers to contract respecting liability in the matter of interstate transportation, and that, therefore, the entire subject was removed from state regulation and control. In the various cases decided by this court, since the passage of the Carmack Amendment, and which have been cited herein, the law as applied to determine the validity of the contracts under question, was not an express provision of the Carmack Amendment, because no specific and definite provision respecting such contracts was in the amendment. Congress did not, in that legislation, specifically provide, for instance, that carriers might contract to the effect that if a valuation was agreed upon by the shipper and carrier, and the lower rate of transportation thereby obtained, then the liability of the carrier in case of loss should be for no more than such agreed value. Yet this court held these contracts valid and binding; they were held valid and binding because under the general common law as applied by this court, such contracts were valid and binding; and the common law as applied by this court, was

held as the test of the validity of the contracts, because the Carmack Amendment "indicated a purpose to bring contracts for interstate shipments under one uniform rule of law not subject to the varying policies and legislation of particular states."

We have in this case, contracts relating to interstate transportation. Under these contracts, cars of the circus company loaded with paraphernalia, an extensive menagerie of wild animals, tents, equipment, horses, wagons, performers and employees, all comprising the circus outfit, were moved over the lines of the plaintiff in error in interstate commerce between Lincoln, Nebraska, and Atlantic, Iowa. The contract related to and governed this movement in interstate commerce, and fixed the rights and liabilities of the parties with respect to the shipment and transportation. By the contract, plaintiff in error, although a railroad company doing an interstate business, contracted with respect to this particular interstate shipment as a private carrier and was, by the contract, relieved from liability, even for its negligence. The validity of these contracts is to be determined by deciding whether, with respect to this interstate shipment and movement, the plaintiff in error had the power to make the particular contract it did. This court has, as we have shown, repeatedly held that the matter of the power of railroad companies to contract with respect to their liability in matters of interstate transportation, was the subject dealt with by the Carmack Amendment, and that, therefore, the laws and policies of particular states respecting the validity of such contracts, were superseded.

We submit, therefore, that the validity of the contracts in question relating to and providing for, as they do, a movement and transportation in interstate commerce whereby the liabilities of the parties were fixed and determined, is a matter to be determined by the common law as declared by this court, and enforced by the federal courts throughout the United States.

II.

Under the common law, as applied by this court and federal courts generally, the contracts in question are valid and binding and a complete defense to this action.

The nature and provisions of the contracts have been hereinbefore set forth. If, at common law, as the same is applied by this court and federal courts generally, a common carrier, when acting outside the performance of its legal duties as such, may contract as a private carrier and stipulate in such contract for freedom from liability for injury, due to its negligence, to persons or property transported under such contract, and, if at such common law a common carrier is under no legal duty to receive, haul and transport cars owned and fitted up by showmen and used exclusively by them to house and transport their performers, employees and circus property, as a complete outfit, from place to place, then the said contracts are valid and constitute a complete defense to this action.

The right of a common carrier, when acting outside the performance of its legal duties, as such, to contract as a private carrier and to stipulate in such contract for freedom from liability for injury, due to its negligence, to persons or property carried under such contract, is broadly recognized by this court.

In *Railroad Company v. Lockwood*, 17 Wall 357, 377, this court said:

> "A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry."

Santa Fe, etc., Railway Company v. Grant Brothers Construction Company, 228 U. S. 177, was a case wherein the Railway Company transported, under a special contract which exempted it from all liability for injury to persons or property so transported, the employees and materials employed and used by the Construction Company in doing certain work for the Railway Company.

In the opinion this court, after stating it to be the established doctrine of the court that a common carrier cannot secure immunity from liability for its negligence by any sort of stipulation and that, in the prosecution of its business as such a common carrier, it is not permitted to

drop its character and transmute itself by contract into a mere bailee with right to stipulate against the consequences of its negligence, said (p. 185):

> "Manifestly, this rule has no application when a railroad company is acting outside the performance of its duty as a common carrier. In such case, it is dealing with matters involving ordinary considerations of contractual relation; those who choose to enter into engagements with it are not at a disadvantage; and its stipulations even against liability for its own neglect are not repugnant to the requirements of its public service. The rule extends no further than the reason for it. It is apparent that there may be special engagements which are not embraced within its duty as a common carrier, although their performance may incidentally involve the actual transportation of persons and things, whose carriage in other circumstances might be within its public obligation. *Baltimore & Ohio, etc. Railway Co. v. Voigt*, 176 U. S. 498, and cases cited; *Northern Pacific Railway Co. v. Adams*, 192 U. S. 440; *Long v. Lehigh Valley R. R. Co.*, C. C. A. 2d Circuit, 130 Fed. Rep. 870."

In the same opinion this court, after declaring that, in dealing with transportation of the character embraced in the contract, a railroad company is not acting in the performance of its duty as a common carrier, said (p. 188):

> "The parties then were free to make their own bargain as to this transportation and the liability which should attach to it. There is no rule of public policy which denies effect to their expressed intention, but on the contrary, as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made. Undoubtedly, it is not to be lightly concluded that the Railway Company has been relieved from liability for its neglect, but on the other hand, if this was the agreement, as fairly interpreted, it is not to be arbitrarily overridden. The parties were on an equal footing. * * * We

> are not at liberty to revise the contract, and the question simply is, whether the stipulation against liability in view of the reduced rates covered all losses, those which might be due to the carrier's neglect as well as others."

Further, in the same opinion this court, after overruling the claim that general words of exemption are insufficient to cover injuries growing out of the carrier's negligence, said (p. 190):

> "It is true that general words of exemption have often been found insufficient to cover injuries due to negligence, and a rule imposing such a limitation upon their effect has manifest propriety in those jurisdictions where common carriers, acting as such, are allowed to stipulate against the consequences of their neglect if this is done in explicit terms. But here, to repeat, we are entirely out of the domain governed by the rule of public policy affecting common carriers, and the agreement must be taken according to its actual intent."

It follows, on the authority of the *Lockwood* and *Construction Company* cases, that under the common law, as applied by this court, a common carrier, when acting outside the performance of its legal duties as such, may contract as a private carrier and in such contract stipulate for freedom from liability for injury, due to its negligence, to persons or property transported under such contract.

Under the common law, as applied by this court and federal courts generally, the plaintiff in error was under no obligation, as a common carrier, to move the circus outfit over its line in the manner the same was moving at the time of the injury to defendant in error. That is to say, under such law a railroad corporation, as a common carrier, is under no legal duty to haul and transport cars owned and fitted up by showmen and used exclusively by them to transport their performers, employees, wild and domestic animals, wagons, tents and other show and circus property, as a complete outfit, from place to place.

This rule rests on the principle that such loaded cars are not such goods as railroads hold themselves out to carry and in respect to which they assume a public duty to serve all alike, who apply for carriage; that the movement of cars, so owned and loaded, in solid trains, persons and

property moving in the same train, for short hauls on special night schedules arranged to meet the exigencies of the circus business, with stoppage privileges for the purpose of giving exhibitions of such circus, is not such service as railroads hold themselves out to render and in respect to which they assume a public duty to render to all alike who apply for carriage.

There being no common law duty to carry such cars or render such service, a railroad company is free to undertake or decline such service. The rendition of such service, and the terms upon which the same will be rendered is a matter for private bargain and contract between the parties. In this case the plaintiff in error and the circus company made such private bargain and contract.

This contract is the usual one in such cases. By its terms the plaintiff in error, contracting as a private carrier, hired or leased to the circus company the use of its roadbed, tracks and the necessary engines, engineers and trainmen for the movement by the circus company of its circus, as a complete outfit, to, from and between the places named in the contract, the engineers and trainmen so hired, while engaged in such service, to be the employees of the circus company; and in consideration thereof the circus company contracted and agreed, to pay the plaintiff in error a stipulated sum which was recited to be, and in fact was, less than the regular fares and charges for the transportation of passengers and freight, to release and did release plaintiff in error of and from all liability for injury to persons or property transported under said contract "whether or not any such loss, damage or injury arises in any way from, or is in any way attributable to any fault or negligence of the first party (plaintiff in error) or any of its officers, agents or employees, in or about the performance of the first party's general business or in connection with the railroad or property or any duty whatsoever of the first party," to indemnify and save harmless plaintiff in error from all claims and actions resulting from or growing out of injury to persons or property transported under said contract.

The defendant in error, at the time of his injury, was an employee of the circus company and was being transported as such by his employer, as a part of its circus outfit, in a car and in a train of cars belonging to his employer which his employer was running over the tracks of the plaintiff in error under the aforesaid special contract. He had paid

no fare and his only right to be in said car and on said train was by virtue of his contract of employment with the circus company and the aforesaid special contract between plaintiff in error and the circus company.

The defendant's said contract of employment was in writing wherein by the terms thereof, after reciting that it was known and understood "that the first party (the circus company) contracts with railway lines over whose tracks they travel to save transportation companies harmless, even for gross negligence, from any and all claims, demands and damages of employees of first party" and "that such contract between Railway Companies as private carriers and first party, furnishes the opportunity of employment to second party (the defendant in error)" he "recognizing said privity in railroad transportation hereby renounces his rights as a passenger in traveling on any railroad line while in said service and releases all such railroad companies from claim on his part for any damages or injury whatsoever", and agrees "to protect, indemnify and hold harmless" the circus company and to pay to the circus company all sums which it may be required to pay in consequence of any injury to him, and also releases said circus company from any claim he "may in the future have due to or growing out of any injury received in said service either as against said first party or any railroad company."

Baltimore & Ohio S. W. Ry. Co. v. Voigt, 176 U. S. 498 was an action brought by plaintiff against the defendant to recover damages sustained while being transported as an express messenger on the train of the defendant. There was a special contract between the express company and the defendant, for the transportation of the messenger and also a contract of employment between the express company and the plaintiff, said contracts being similar in form and substance to the contracts in the case at bar. That is, said contracts released the railroad company from any liability for injuries sustained by the plaintiff by reason of the defendant's negligence. The court said (p. 512);

> "It is evident that, by these agreements, there was created a very different relation between Voigt and the railway company than the usual one between passengers and railroad companies. Here there was no stress brought to bear on Voigt as a passenger desiring transportation from one point to another on the railroad. His occupa-

> tion of the car, specially adapted to the uses of the express company, was not in pursuance of any contract directly between him and the railroad company, but was an incident of his permanent employment by the express company. He was on the train, not by virtue of any personal contract right, but because of a contract between the companies for the exclusive use of a car. His contract to relieve the companies from any liability to him, or to each other, for injuries he might receive in the course of his employment, was deliberately entered into as a condition of securing his position as a messenger."

After citing with approval the case of *Robertson v. Old Colony R. R. Co.*, 156 Mass. 525, *Coup v. Railway Company*, 56 Mich. 111, *Railway Company v. Wallace*, 66 Fed. R. 506, and other cases, the court stated its conclusion as follows (p. 520):

> "Without enumerating and appraising all the cases respectively cited, our conclusion is that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of *Railroad Company v. Lockwood;* that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger, and that such a contract did not contravene public policy."

In the course of its opinion in the Voigt case, this court also cited with approval, *Railway Company v. Mahoney*, 148 Indiana 196, wherein it was held that railway companies may contract as private carriers in transporting express matter for express companies, and in such capacity, may require exemption from liability for negligence as a condition to the obligation incurred, and that a release by an employee of an express company for all liability for injuries sustained by the negligence of the employee or otherwise, includes the liability of the express company to hold a railroad, with which it does business, harmless against claims by employees of the express company for injury,

and precludes an action against the railroad company for causing his death while in the discharge of his duty as an employee of such express company.

Robertson v. Old Colony R. R. Co., 156 Mass. 525, was an action brought by plaintiff against the defendant to recover damages for personal injuries sustained while the latter was being transported by the defendant, as an employee of a circus outfit then being transported by the defendant under special contract. The said special contract in terms exonerated the railroad company from any and all claims for damages to persons and property being so transported, however occurring. The syllabus of the case is as follows:

> "One whom a railway corporation was under no common law or statutory obligation to carry in the manner in which he was carried at the time of the accident, is not entitled to enforce against such corporation, the obligation and liability of a common carrier.
>
> If the proprietors of a circus contract with a railway corporation for the hauling of certain cars, according to a schedule of time fixed by agreement, the work to be chiefly at night, and the price to be paid a gross sum, stated in the agreement to be less than the regular rates, and the proprietors agree to load and unload the cars, and to exonerate and save harmless the corporation from any and all claims for damages to persons and property during the transportation, however occurring, and to assume all risk of accident from any cause, an employee of the circus cannot recover of the railway for injuries received by him from one of the cars being out of proper condition, for the railway was not under any duty to inspect the cars, and had no control over their condition."

Coup v. Railway Company, 56 Mich. 111, was an action brought by the proprietor of a circus to recover damages to cars and equipment and to persons and animals caused by a collision of two trains made up of his circus cars while in transit through Illinois. The trial court held defendant to the common law liability of a common carrier, and held there was no avoiding liability by reason of the special contracts under which the transportation was directed.

The Supreme Court of the State reversed said judgment, saying:

> "Unless this undertaking was one entered into by the defendant as a common carrier, there is very little room for controversy. The price was shown to be only ten per cent. of the rates charged for carriage, and the whole arrangement was peculiar. If it was not a contract of common carriage, we need not consider how far in that character contracts of exemption from liability may extend. In our view it was in no sense a common carrier's contract, if it involved any principle of the law of carriers at all.
>
> "The business of common carriage, while it prevents any right to refuse the carriage of property such as is generally carried, implies, especially on railroads, that the business will be done on trains made up by the carrier and running on their own time. It is never the duty of a carrier as such to make up special trains on demand, or to drive such trains made up entirely by other persons or by their cars. It is not important now to consider how far, except as to owners of goods in the cars forwarded, the reception of cars, loaded or unloaded, involves the responsibility of carriers as to the owners of the cars as such. The duty to receive cars of other persons when existing, is usually fixed by the railroad laws, and not by the common law. But it is not incumbent on companies in their duty as common carriers to move such cars except in their own routine. They are not obliged to accept and run them at all times and seasons, and not in the ordinary course of business.
>
> "The contract before us involves very few things ordinarily undertaken by carriers. The trains were to be made up entirely of cars which belonged to plaintiff and which the defendant neither loaded nor prepared, and into the arrangement of which, and the stowing and placing of their contents defendant had no power to meddle. * * *
>
> "The trains were not to be run at the option of the defendant, but had short routes and special

stoppages, and were to be run on some part of the road chiefly during the night. They were to wait over for exhibitions, and the times were fixed with reference to these exhibitions and not to suit the defendant's convenience. There was also a divided authority, so that while defendant's men were to attend to the moving of the trains, they had nothing to do with loading and unloading cars, and had no right of access or regulation in the cars themselves.

"It cannot be claimed on any legal principle, that plaintiff could, as a matter of right, call upon defendant to move his trains under such circumstances and on such conditions, and if he could not, then he could only do so on such terms as defendant saw fit to accept. It was perfectly legal and proper for the greatly reduced price, and with the risks and trouble arising out of moving peculiar cars and peculiar contents on special excursions and stoppages to stipulate for exemption from responsibility for consequences which might follow from carelessness of their servants while in this special employment."

Chicago, M. & St. P. R. Co. v. Wallace, 66 Fed. 506, was an action identical with the case at bar, except that plaintiff was proprietor of the circus and sued for damages to property. The opinion is by the Circuit Court of Appeals (Seventh Circuit) and therein the court says (p. 510):

"That the company, in carrying the goods under the contract, was a private, and not a common or public carrier, is the conclusion which the court has reached. There was no evidence offered that the railroad company had ever carried similar goods for Wallace before in his own private cars, or that it had ever carried or held itself out to carry goods in that manner for others, and there is no presumption that railroad companies would do so. We know from common observation that they do not hold themselves out as common carriers of wild and domestic animals to be transported in the private cars of the owners, and loaded in a manner agreeable to the owners; persons, animals, horses, and other

property being carried upon the same train, which is operated at irregular times and seasons, at the convenience of the owners of such cars. They ordinarily operate their freight trains and passenger trains separately, and upon time schedules, prepared in advance by experts for the company, and with a view to reduce the danger of accident to a minimum. Here was a special contract in writing, wholly different from the ordinary bill of lading, providing for the hauling of a special train of cars, belonging wholly to the defendant in error, to be loaded as he pleased with persons, wild animals, domestic animals, and other property, and to be run on special time, the hours of departure to depend upon the time when the plaintiff should have his cars loaded and ready to start. Wallace was to be wholly responsible for the loading and unloading as well as for the care of the property while in transit, the only duty of the railroad company being to haul the cars. Another significant provision of the contract is that the property was to be carried at greatly reduced rates, in consideration of which the plaintiff was to assume all the risk of accidents, releasing the company therefrom. If this provision of the contract, as no doubt it was, was binding upon the railroad company, why not upon the plaintiff? The obligation was mutual. Why could not the railroad company say 'You wish your property carried in your own private cars, which is contrary to our usual rules and regulations, and at greatly reduced rates. You wish your entire circus troupe, horses, animals, and all the paraphernalia and accompaniments of a circus, carried for less money than at our rates as common carriers it would cost you to have the persons alone of your company transported, and you desire that they be transported at special times, also contrary to our rules as common carriers, and which materially increases risks in our business. Now, here are our roadbed and our engines. They have answered our own purposes of transportation fairly well. If you wish to take upon yourself all risk of damage by accident, we will

> accept your proposition, and carry at the rates proposed.' There is nothing unlawful in this, unless we assume that the railroad company cannot carry property or persons at all, except as common carriers, which is against all rule and precedent. No common carriers undertake to carry every species of property, in respect to which they have not held themselves out as common carriers. They may contract as private carriers and in that case they may make any reasonable contract. The railroad company as a common carrier could not enter into such a contract as this, because it cannot as a common carrier limit the liability imposed upon it from considerations of public policy. But the case is different in respect to property of which it is not a common carrier."

Wilson v. Atlantic Coast Line R. Co. 129 Fed. R. 774 was also a circus case: that is, a case wherein a circus outfit was moved under special contract, and plaintiff sued to recover for damages to property. The first paragraph of the syllabus is as follows, and states the law of the case.

> "Where a railroad company agreed to haul certain cars of the proprietor of a circus according to a special schedule, and for a price less than the regular rates for such service, the carrier's servants having no right to direct the loading or unloading, which was in the exclusive charge of the employees of the circus company, an express contract between the parties, exempting the carrier from liability for the negligence of its employees, and releasing the carrier from liability for loss and damage to any of the circus company's property, menagerie, cars, or equipment while in transit, and to indemnify the carrier against damage or injury to any of the circus company's officers, agents, performers, or employees, was not invalid as contrary to public policy."

Clough v. Grand Trunk Western Ry. Co., 155 Fed. R. 81, was an action brought by an employee of a traveling circus company to recover damages for personal injuries. The circus outfit was moved under a special contract which, in terms exempted the railway company from liability for injuries sustained by employees of the circus company

while being transported under such special contract. The opinion is by Judge Lurton, afterwards Justice of this court.

In the opinion, the court says (p. 82):

> "If the contract under which the Wallace Circus was being transported over the railway of the defendant was a valid contract, the relation of the railway company to the circus company was not that of a common carrier at all. That the railway company was under no common-law obligation to move the circus company over its line in the manner it was being transported at the time of the injury to the plaintiff in error must be conceded. If the railway company was under no statutory or common-law obligation to render the special service it was called upon to render, there were no reasons of public policy which forbade the rendition of such service upon such terms as the parties might stipulate. The right to make special stipulation under such conditions has been recognized and applied in a number of cases substantially like the case at bar when circus trains were hauled under special agreements relieving the company from carriers' liability. (Citing cases.) The same freedom of contract in respect to the transportation of express matter and express messengers has been recognized repeatedly. (Citing cases.)"

Sager v. Northern Pac. Ry. Co., 166 Fed. R. 526, was an action wherein the plaintiff, an employee of the circus company, sued the defendant to recover damages for personal injuries while riding in one of the cars belonging to the circus company. The circus train was being moved under a special contract substantially like that in the case at bar. The case is unlike the case at bar in this: there was no contract of employment between the circus company and the plaintiff, whereby the plaintiff released the defendant from liability, and there was no allegation in the answer that plaintiff had any knowledge of the contract between the circus company and the defendant. The case was ruled on demurrer to the answer. The court said (p. 527):

> "It must be conceded that the railroad company was under no common-law obligation to move the circus company's train over its lines of road in the manner in which it was being trans-

ported at the time the plaintiff was injured. It must also be conceded that there is no principle of the common-law which forbids the making of contracts of this character as against public policy. These propositions are settled by abundant authority."

It thus appears that under the common law as applied by this court and federal courts generally, the contracts in question are valid and binding, and constitute a complete defense to the action.

For the reasons herein stated, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

WILLIAM D. MCHUGH,
Attorney for Plaintiff in Error.

WILLIAM H. HERDMAN,
JOHN M. KELLEY,
of Counsel.

APPENDIX.

EXHIBIT "A."

Contract between Chicago Rock Island & Pacific Railway Company and owners of circus.

THIS AGREEMENT, Made and entered into this Fifth day of June, A. D. 1913, at Chicago, Ill., by and between the CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, first party, and BARNUM & BAILEY SHOWS, second party.

WITNESSETH:

WHEREAS, The second party is the owner of a circus, caravan and menagerie, including horses, wild animals and other articles usually used in connection with and as part of a circus and menagerie, and the paraphernalia and tents for the same, and the first party is not a common carrier thereof and cannot be required to transport the same, and

WHEREAS, The second party is also the owner of or uses special cars expressly designed and adapted for the carriage of said circus, animals, paraphernalia, tents, etc., and certain railway passenger coaches for the transportation of the performers in said circus, and the agents and employes of the second party in and about the same, and

WHEREAS, The second party desires to enter into an agreement with the first party for the use of its roadbed and tracks and the necessary engines, engineers and other employes of the first party, for the purpose of moving said cars, equipment and employes of the second party from point to point where performances are to be given on the line of the railroad of the party of the first part.

NOW, THEREFORE, The parties hereto have covenanted and agreed, and do hereby covenant and agree, each with the other as follows:

The first party agrees to furnish to and for the use of the second party the necessary locomotive engines, with the necessary fuel therefor, and the engineers, firemen and other employes, and the right to use its tracks for the transportation of said circus, menagerie, employes and equipment of the second party, by train of.....sections, to consist of 15 coaches, 5 box cars, 21 stock cars and 40 flat cars, being a total of 81 cars, from Watertown, S. D., to Davenport, Ia., with the privilege of stopping for exhibition at

the following places on the line of said railroad between said points, to-wit:

To be received empty from the M. & St. L. Road and moved:

Watertown, S. D., to Sioux Falls, S. D., about midnight, 8-2-13, and be delivered empty (or loaded) to the I. C. R. R. at Sioux Falls.

Thence, to be received empty from the C. B. & Q. and moved:

Lincoln, Nebr., to Atlantic, Ia., about midnight 8-11-13.

Atlantic, Ia. to Des Moines, Ia. about midnight, 8-12-13.

Des Moines, Ia., to Ottumwa, Ia., about midnight, 8-13-13, and be delivered empty to the C. B. & Q. R. R.

Thence, to be received empty from I. C. R. R. at Cedar Falls, Ia., and switched to Waterloo, Ia., for loading and movement to Cedar Rapids, Ia., about midnight, August 21, 1913. Thence moved:

Cedar Rapids, Ia., to Iowa City, Ia., about midnight, 8-22-13.

Iowa City, Ia., to Davenport, Ia., about midnight 8-23-13 and be delivered empty to the C. M. & St. P. Ry. and from .....to.....with the privilege of stopping for exhibition at the following places on the line of said railroad between said points, to-wit: .....

.....

.....

and to haul 3 advance advertising cars, as hereinafter stated.

All movements are to be made during the months of July and August, 1913. No change shall be made in the foregoing or in the movement of cars unless ten days' notice in writing shall have been given to the first party and the first party has agreed to make such change, but in no event shall changes be made involving longer or more expensive hauls, unless for such additional compensation beyond that provided for herein as by the first party shall be deemed to be reasonable.

The second party warrants all of the said cars and coaches, to be furnished by it as aforesaid, to be in good condition and running order, and hereby agrees, at his or its own cost and expense, to keep same in like good condition and running order, and to this end furnish the men necessary to regularly and properly inspect said cars and coaches, to provide for proper oiling and to make all needful repairs

thereof, and to indemnify and save harmless the first party against loss or damage resulting from any defects in said cars or coaches, or from overloading cars, or from the negligence of the second party or any of his or its employes, including those hired to it for the time by the first party, and to return all locomotives and other machinery in the condition received.

The first party may, however, for its own protection, if it so desires, itself inspect the cars and coaches used by the second party, and may cancel this agreement, if it deems such cars or coaches unsafe for use; but no act of the first party in inspecting said cars or coaches shall be understood or deemed to release the second party from any liability for loss, damage or injury that may occur by reason of the defective condition thereof, or from the use thereof in any manner.

It is further agreed that the first party shall not pay mileage for the use of said cars and coaches to be used in the transportation of the second party's circus, menagerie, paraphernalia, etc., and it is further agreed that if the said circus, menagerie, paraphernalia, etc., are delivered to the first party in cars for which it would be liable for mileage under usual customs, the second party agrees to pay, in addition to the amounts shown below herein, such mileage as the first party may be or become liable for to the owners thereof.

The first party agrees, at each of the above points, to furnish a sufficient number of engines and employes in connection therewith to enable the second party to do all necessary switching of its cars and train. The second party agrees to diligently and sufficiently inspect all of said cars and coaches, and to this end will employ a sufficient number of competent inspectors, but such inspectors may be chosen, if the second party shall so elect, from the regular force of inspectors employed by the first party, and in that case no additional compensation shall be paid for this service to the first party.

The second party agrees, for the use of the railroad and engines of the first party, and the necessary engineers, firemen, train despatchers and other employes, to move and work said train, and in further consideration of the first party's agreements herein set forth, to pay to the first party the sum of thirty-one hundred forty-five Dollars ($3145.00),

to be divided and paid in advance as per amounts shown herein.

From Watertown, S. D.	to Sioux Falls, S. D.	$.....
From Lincoln, Nebr.	to Atlantic, Ia.	$.....
From Atlantic, Ia.	to Des Moines, Ia.	$.....
From Des Moines, Ia.	to Ottumwa, Ia.	$3145.00
From Waterloo, Ia.	to Cedar Rapids, Ia.	$.....
From Cedar Rapids, Ia.	to Iowa City, Ia.	$.....
From Iowa City, Ia.	to Davenport, Ia.	$.....

The said sum for each run to be paid before leaving each point of departure.

The second party further agrees that, on or before the first movement of its circus, caravan or menagerie under this agreement, it will purchase and pay therefor, at the regular published tariff rates Nine hundred twenty ($920.00) dollars worth of transportation over the lines of the first party, for the exclusive use of the officers, agents, employes and servants of the second party, while traveling upon the regular trains of the first party in connection with the movement of said second party's circus, caravan or menagerie hereunder or in connection with advertising the same.

The second party agrees, by means of the service, and at the sole expense of the second party, to receive its cars and coaches from connecting carriers at Watertown, S. D. and to deliver the same to connecting carriers upon the termination of this agreement at Davenport, Ia., to load and unload all of said cars and coaches and train and to have the same loaded and ready to start from each of the above designated points, at such hour as will make it unnecessary to run faster than ordinary safety will admit.

It is expressly agreed and understood that this agreement is not made by the first party as a common carrier, but only as a hiring of said locomotives, engines, and employes, and the use of its railroad to the second party, for the purpose of enabling the second party to move said train between said points; that all of the said cars, coaches, and trains shall be operated under the management, direction, orders and control of the second party or its agents.

It is expressly understood and agreed that all engineers, firemen, conductors, brakemen, train dispatchers and other operators and employes, furnished by the first party, are in the operation and movement of said cars, coaches and trains, exclusively the employes of the second party, but

all of said cars, coaches and trains shall be run according to the rules, regulations and time cards of the first party.

It is expressly understood and agreed, in consideration of the first party hiring the use of its railway and furnishing the motive power and employes to handle the second party's cars, coaches, paraphernalia and employes, as aforesaid, and for less than it would receive if it handled said circus, cars, paraphernalia, menagerie and employes, as regular freight and passengers upon its cars, and in consideration of the privilege of stopping over at the points hereinbefore designated, that the first party shall not be responsible or liable to the second party, or to any other person, partnership or corporation, for any delay of any cars or trains, however caused, and whether or not arising in any way from anyone's fault or negligence, or for any loss, damage or injury to the property or person of the second party or of anyone employed by the second party, or being upon any trains or cars, hauled under this agreement, or being upon any premises of the first party or connected in any way with said circus, caravan or menagerie, or with the business of the second party, or for any loss of or damage or injury to the property or person of anyone else, or of any partnership or corporation whatsoever, whether or not any such loss, damage or injury arises in any way from, or is in any degree attributable to, any fault or negligence of the first party or any of its officers, agents, or employes, in or about the performance of this agreement or the performance of the first party's general business or in connection with the railroad or property or any duty whatsoever of the first party.

The second party further agrees that it will fully comply with any and all statutes and laws, either of the United States or of any State in which its cars and coaches may be located at any time, regulating the construction or equipment, or otherwise, of cars and coaches, and agrees to indemnify and save harmless the first party from any and all loss, damage, injury, fine or penalty, or claim therefor, which may occur to or be imposed against the first party, in any manner, arising or growing out of any violation or violations of any such statute or law, and from all costs and expenses whatsoever incident to or connected therewith.

But, if notwithstanding this contractual exemption from liability, the first party shall be held liable in any court for any loss, damage or injury, suffered by the second party

on any account, it is hereby agreed, in consideration of the special undertaking of the second party and the low rate of charge, that such damage shall be and is hereby liquidated and stipulated not to exceed the actual value of the animals or property aforesaid, which for the purpose of this agreement, and by reason of the said special undertaking and low rate, it is by the second party stipulated, agreed and represented that in no case will exceed the sum per head for each animal as follows:

Elephants, Hippopotami, Giraffes, Rhinoceroses	$500.00 each
Horses, Zebras, Lions and Tigers	100.00 each
All others of the equine and feline species	25.00 each
Buffaloes and others of the bovine species	50.00 each
Seals	10.00 each
Monkeys, Crocodiles, Alligators, Serpents and other Reptiles	5.00 each
Birds, all species, and all other animals not enumerated	5.00 each

It is further agreed that the value of each chariot, band wagon, calliope or other vehicle will not exceed $100.00 and that the value of each canvas tent with center poles, ropes, and paraphernalia complete, will not exceed $100.00.

The second party further agrees and undertakes, as a further consideration hereof, that in case of delay, loss, damage or injury, to the person or property, either of the second party or any other persons, association of persons or corporation, carried or to be carried upon any of the cars or trains herein specified or employed on or about or in connection with the same on the business of the second party, it, the said second party, will release and does hereby release the first party from all liability or claim therefor for loss, damage or injury to itself or its business or property, will indemnify and forever save harmless the first party from all claim, demand, actions, causes of action, costs, judgments, and expenses, including attorney's fees, resulting from or growing out of such delays, loss, damage or personal injury, the second party hereby assuming and agreeing to defend at its own cost all such claims, demands and actions, and to satisfy and pay the same, and the second party further undertakes and agrees to inform by personal notice, to each thereof, all of the persons permitted by the second party to be carried on any of said cars, coaches and trains, under the terms of this agreement, and to advise

and notify all such persons, and each thereof, that they are carried by the second party and not by the first party, and that the first party has not assumed, with respect to them or their baggage, or other personal property, any of the duties and responsibilities of a carrier of passengers.

It is further agreed that the second party may, at its option, furnish 3 advertising cars carrying 25, 25, and 22 persons, respectively, employed as advance advetising agents, traveling exclusively in said cars. Advertising or other agents, traveling upon ordinary and regular trains of party of first part, shall be provided with proper and regular transportations as above provided. Said cars to be in good order and running condition, and to be equipped with Master Car Builders' Association trucks, running gears, platforms, couplers, etc., and with air brake equipment, and these advertising cars may be attached to trains of the first party, to be designated by it, and hauled from Watertown, S. D., to Davenport, Ia., with the privilege of stopping and being left on the side track at any intermediate station which the second party may designate, at any time between the tenth day of July, 1913, and the twenty-third day of August, 1913, and shall be moved upon notice from the second party, as soon after notice is given as practicable, for the consideration aforesaid, and the first party shall not be liable for any damage to or loss of said cars or property therein or for injury to or death of the persons carried thereon, whether or not arising from any fault or negligence of the first party, or any of its officers, agents, or employes, and the second party agrees to indemnify and save harmless the first party against any loss or damage on account of injuries to or death of persons traveling in said advertising cars, or damages on account of loss or injury to their property, and this stipulation is to be deemed and construed as dependent upon and forming part of the foregoing agreement.

It is a further consideration of this agreement, and the parties hereto agree, that the second party is to have sole charge of every person and of all animals and property on any car, coach or train hauled under this agreement, and the first party does not assume, and shall be under no responsibility for the safety of any of the cars, coaches, persons, animals or property on said cars, coaches and trains, in charge of the second party, or of advance agents, from any cause whatever, and the second party agrees to, and

does hereby indemnify and save harmless the first party against all loss, damage or injury on account of strangers, tramps, or others riding on said cars, coaches, or trains, and being injured or killed, or on account of strangers, tramps, or other persons being injured or killed in the operation of said cars, coaches or trains, or in the handling, loading or unloading of cars, and will protect the first party from damages, and cost incident thereto, suffered by anyone from wild, tamed or domesticated animals escaping from cars or custody, and protect the first party against all loss, damage and cost for and on account of the spread or transmission of any disease to persons or animals from unloading offal or otherwise, and against any fine or penalty arising therefrom which may be imposed against the first party by any State, municipality or other competent authority.

The second party covenants and agrees, in consideration of the foregoing, for itself or himself, and for all of the employes or other parties or persons employed or being in or around or in connection with said circus, menagerie or the business of the second party, that in the event of any loss, damage or injury of property or persons for which, in accordance with the terms, stipulations and provisions of this agreement, a cause of action may exist against the first party (it not being intended hereby in any manner to effect or restrict any such terms, stipulations or provisions), the second party, for himself and for his employes and such others, will give written notice of such loss, damage or injury to some freight or station agent of the first party within thirty (30) days after the occurrence thereof, and in such notice will state the time, place, nature, cause and amount of such loss, damage or injury. Failure on the part of the second party to comply with the requirements of this paragraph shall absolutely bar and defeat any cause of action for any such loss, damage or injury; and if such notice is given, any action for such loss, damage or injury must be brought within ninety (90) days after the occurrence thereof, and not later, any statutes of limitations to the contrary notwithstanding.

The party of the second part further covenants and agrees, that if any property of the first party or property of others in its possession and control is destroyed, damaged or injured while any trains or cars of the second party are upon the railroad of the first party, under this agreement,

and such destruction, damage or injury is done or contributed to by any employe of the second party or by any person connected with said circus or menagerie, or the business of the second party, then in that event the second party will reimburse the first party for such injury, damage or destruction, and for all loss, costs, expenses, and recoveries on account thereof, whether or not the acts of the second party's employes, or of the persons connected with said circus, menagerie, or business, which caused or contributed thereto, were done in the course of their employment in or about said circus, menagerie or business.

IN WITNESS WHEREOF, This agreement has been executed by the parties hereto on the day and year first above written.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO.,
(Signed) By H. GOWER,
Freight Traffic Manager.
BARNUM AND BAILEY SHOWS,
(Signed) By CHAS. C. WILSON.

EXHIBIT "B"

Contract of Employment between owners of circus and Defendant in Error.

It will be noted that there is endorsed on said contract, a stipulation that the signature "Jos. Mauchard" attached to said contract, is the genuine signature of the Defendant in Error herein.

THIS AGREEMENT, made at Detroit this 9th day of June, 1913, by and between Albert Ringling, Alf. T. Ringling, Chas. Ringling, John Ringling, and Henry Ringling, co-partners, doing business under firm name of Barnum & Bailey, herein known as party of first part, and Joe Mauchard of Detroit, Mich., party of second part.

WITNESSETH: Expressly upon the considerations and conditions hereinafter named, the undersigned second party accepts employment of first party as C. H. and agrees to work for first party during season of 1913 at 20- per month. Expressly on condition that second party continuously remain in the service of first party from date of this engagement to the end of present season, the first party, to encourage faithfulness among employes and efficiency in service volunteers as a gratuity to pay to second party an additional $..... for the last full month's service ending

with the close of said circus season; but no rights whatever of second party shall vest regarding said payment, it being merely a gratuity and not affecting the salary hereinabove provided; and nothing in this clause contained shall qualify or limit the right to terminate this contract as hereinafter provided.

As evidence of good faith it is agreed that first party may retain one week's wages of second party until close of season.

IT IS KNOWN AND UNDERSTOOD BY EACH PARTY AND RECOGNIZED AS A VALUABLE CONSIDERATION OF THIS CONTRACT:

(a) That the times, manner and means of transportation incident to this employment and circus business increase the risk in travel beyond the ordinary;

(b) That the character of the services to be performed involves hazard;

(c) That said first party contracts with railway lines over whose tracks they travel, to save said transporting companies harmless, even for gross negligence, from any and all claims, demands and damages of employes of first party, and especially second party herein;

(d) That such contract between Railway Company as private carrier and first party, furnishes the opportunity for employment of second party.

NOW THEREFORE, for valuable consideration, and in consideration of this employment and the furnishing by first party to second party of transportation and board of the kind customary and usual in the circus business, and in consideration of special personal benefits and advantages beyond the scope of employment inuring to second party herein, the second party accepts and assumes the increased hazard of railroad travel and circus service in all particulars and circumstances and hereby exempts and releases first party from all claims for injuries, accidents, sickness and damages of whatever nature sustained in said service, whether due to negligence (including gross negligence) of first party, their employes, agents or bosses, or the negligence of any employee of any railroad company transporting first party; and second party, recognizing said privity in railroad transportation, hereby renounces his rights as "passenger" in traveling on any railroad line while in said service, and releases all such railroad companies from claim on his part for any damage or injury whatsoever; and second party agrees to protect, indemnify and hold harmless

first party and to pay to first party (and when notified to personally assume payment of) all sums which first party may be subject to pay in consequence of any claim by or injury, sickness or death to, second party; and second party hereby releases first party from any claim he may in the future have due to or growing out of any injury received in said service either as against first party or any railroad company, hereby binding himself, his heirs, executors and assigns firmly by these presents.

That during said employment the services of a physician and surgeon traveling with said circus are, so far as his time and circumstances permit, offered free of charge and as a gratuity to second party. That said second party is in no manner restricted or obligated to receive said services, but may employ on his own account whomsoever he desires.

Second party agrees to faithfully, and to the entire satisfaction of the first party, perform his services under this contract, remain sober and refrain from the use of profanity or improper language, obey orders of superiors and bosses under whom he serves, abide by all reasonable rules and regulations of first party governing conduct of second party; and it is agreed that if at any time during the life of this contract the services of second party be or become unsatisfactory or his conduct offensive to first party, first party has the unrestricted right, free from claim or damage, to dismiss the second party from service and terminate this contract; and said terms and provisions are hereby recognized and accepted as a condition of employment under this contract.

It is agreed that if at any time during said season second party accepts service with said circus in a line of employment differing from the present in the character of services to be performed, or risk incident, then that all the covenants herein contained (except as to salary where changed) shall obtain and remain in full force and effect.

IN WITNESS WHEREOF we have hereunto set our hands and seals the day and year first above written.

BARNUM & BAILEY,
By O. STEVENS [SEAL]
JOS. MAUCHARD [SEAL]

Signed, sealed, read and delivered in presence of

.....

.....

I HEREBY CERTIFY that I am over twenty-one years of age; that I understand and am familiar with the character of services to be performed; that I voluntarily enter into this contract; that in this contract, which is solicited by me, I recognize personal special benefits beyond the scope of employment because of extensive travel and incident advantages; that I have carefully read—heard read—the foregoing contract before signing and fully understand the same.

JOS. MAUCHARD
No. 525 W. 2nd St.,
Cincinnati, Ohio.

Nearest Relative:
MRS. WALTER HERBE,
123 Sumpter St.,
Brooklyn, N. Y.
(Endorsement on back)

It is admitted that the signature "Jos. Mauchard" is the genuine signature of the plaintiff in the case now pending in the District Court of Douglas County, Neb., of Joseph Maucher v. C. R. I. & P. Ry. Co.

MAHONEY & KENNEDY,
Attorneys for Plaintiff.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

No. [redacted]85

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

v.

JOSEPH MAUCHER,

Defendant in Error.

BRIEF AND ARGUMENT ON BEHALF OF THE DEFENDANT IN ERROR.

J. A. C. KENNEDY,
YALE C. HOLCOMB,
PHILIP B. BENNETT,

Attorneys for Defendant in Error.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

No. 344

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

V.

JOSEPH MAUCHER,

Defendant in Error.

BRIEF AND ARGUMENT ON BEHALF OF THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The defendant in error does not claim any mis-statement of facts in the brief heretofore filed by the plaintiff in error, but feels that the statement of facts made therein were not sufficiently comprehensive and complete to acquaint the court with the exact proposition involved. The defendant in error will therefore seek to slightly amplify the statement of facts heretofore made.

The plaintiff in error entered into a contract with Barnum & Bailey, a co-partnership engaged in the circus business. This contract is found on page 102 of the printed

record, and is identified as Exhibit 8, and is also found as an exhibit in the brief heretofore filed by the plaintiff in error. By this contract plaintiff in error *leased* to Barnum & Bailey certain *equipment* and *gave the right* to Barnum & Bailey *to use* certain of their tracks for a fixed sum. The contract expressly provided that it should not be considered as a contract of carriage, but a *lease.*

Barnum & Bailey employed the defendant in error and caused him to sign a contract, which is Exhibit 9 in the printed record, page 138, and which is also made an exhibit to the brief of the plaintiff in error. This contract released Barnum & Bailey, the employer, from any and all damages which might be caused by the negligence of Barnum & Bailey, and also sought to release all railroad companies from certain claims.

Pursuant to the contract between the plaintiff in error and Barnum & Bailey the circus was being moved from Lincoln in the State of Nebraska to Atlantic in the State of Iowa. It was being moved over the lines of the Railway Company, which, between these stations consists of a single track line of railway. This track was not equipped with an electric block signal system, but that portion of the track between two open telegraph stations constituted a block. It is the universal rule of railroading in this country that when one train is permitted to follow another train into the same block, that the following train must proceed at such a rate of speed that it can at all times be stopped within the distance visible to the engineer.

On the trip from Lincoln to Atlantic the circus train was followed by a passenger train operated by the Railway Company. The Railway Company permitted this passenger train to enter the same block in which the circus train was moving. It notified the employees in charge of the passen-

ger train that the circus train was in the same block. The operators of the passenger train utterly disregarded the rule of safety requiring the train to be kept under control and crashed into the rear end of the circus train, killing and injuring a large number of the employees of the circus company, among them being the defendant in error.

An action was brought by the defendant in error in the District Court of Douglas County, Nebraska, to recover damages on account of the injuries which he had thus sustained. The plaintiff in error relied upon the contracts above set out as its sole defense to the action. The trial court held that the contracts were valid:

(1) In so far as defendant in error released his rights as a passenger.

(2) In so far as the contracts made Barnum & Bailey, the carrier, and the Railway Company, the lessee.

(3) In so far as they released the plaintiff in error from all liability because of any negligence in the operation or management of the circus train.

The trial court held that the contracts were void in so far as they released the plaintiff in error from negligence in the operation of the passenger train which ran into and collided with the circus train. The trial court further held:

(1) That the law of the place where the tort was sustained determined the validity of the contracts.

(2) That the plaintiff in error was not acting as a carrier, either public or private, under the contract.

(3) That there was no Federal question involved.

Appropriate instructions were submitted to the jury embodying the Court's theory of the case and a judgment was entered in favor of the defendant in error. The Railway Company took the case from the District Court of Douglas County to the Supreme Court of Nebraska for re-

view. The Supreme Court found no error in the record and affirmed the case. It is true that the Supreme Court in its opinion did discuss the validity of the contracts as affected by the Federal statutes, but this discussion was obviously dicta.

ARGUMENT.

I.

At common law the law of the place of injury determines the liability.

This proposition was before this Court in the case of The Kensington, 183 U. S. 263, 22 Sup. Ct. Rep. 102, 46 Lawyers' Edition 190. A steamship company had sold a ticekt from Antwerp to New York. This ticket contained certain limitations of liability, and furthermore provided that its validity should be determined by the law of Belgium, the place of execution. This court first determined that the exemptions contained in the ticket or contract were contrary to public policies.

> "It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of assent; and, besides, that such conditions are in conflict with public policy."

This court then proceeded to declare that neither comity nor contract would be permitted to over-ride what this court considered the public policy of this country.

> "It is true, as a general rule, that the lex loci governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can a public policy of a country be set at naught."

The rule thus announced has been constantly applied by the various courts in this country. In the case of Weir vs. Rountree, 173 Fed. 776, 97 C. C. A. 500, the officers of the Adams Express Company sought to enjoin the widow of one of their

employees from bringing suit against a raliroad company in Kansas. The injunction was denied, the court saying:

> "One reason why plaintiff is not entitled to the relief asked is that the injury and death occurred in the State of Kansas, and the rights of the widow are to be measured according to the laws of that state. We need not stop to inquire whether or not the contract in question was valid according to the laws of Nebraska, where executed, as the widow is not basing her action upon such contract, but upon the statute law of Kansas. Whether such contract is available as a defense to her action we think determinable according to the laws of Kansas."

The same rule of law was again announced in a case of Smith vs. A. T. & Santa Fe Ry. Co., 194 Fed. 79:

> "Plaintiff's principal contention is that the waiver on the back of the pass was void under a statute of Kansas, as interpreted by its Supreme Court, and, as the pass was delivered in Kansas, it is urged that the validity of the waiver must be determined by the law of that state, though the injury occurred in the state of Oklahoma, under whose laws the waiver was valid. In support of this contention the plaintiff relies upon the general rule that a contract will be interpreted according to the law of the place of its execution and delivery, citing Liverpool & Great Western Steamship Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788. That was an action upon a contract to recover damages for its breach, and in such a case the rule which plaintiff invokes is generally, though not invariably, enforced.
>
> That rule, however, has never been applied in actions of tort like the present. In such cases the law of the place where the injury occurs defines the rights of the parties. The Kensington, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190; Weir v. Rountree, 173 Fed. 776, 97 C. C. A. 500."

This rule of law, of course, is subject to the power of the Federal Government to exclude local legislation upon matters arising or growing out of interstate commerce. If Congress has legislated upon the liability of railroad companies to passengers, or others upon or about trains engaged in interstate commerce, then the defendant in error grants that all State laws and regulations of any kind and character applying to that particular subject would be superseded.

II.

In the absence of Federal legislation the several states may determine the liability of interstate carriers for injuries to persons occurring within their respective jurisdictions.

A great number of decisions of this court have established beyond question that in the absence of specific Federal legislation the several states might indirectly affect interstate commerce through the exercise of the police power of the State. Decisions of this court have further specifically established that regulations of the several states determining the liability of interstate carriers for injuries to persons or property in the absence of specific Federal legislation were within the power of the various states and were not in conflict with the commerce clause of the Constitution. One of the early cases in which this rule was announced was in the case of Sherlock v. Alling, 93 U. S. 99, 8 Sup. Ct. Rep. 567. This Court in that case permitted a recovery for the loss of life occasioned by interstate commerce upon the Ohio River. The recovery was sought and obtained under a statute of Indiana. This Court said:

> "General legislation of this kind prescribing the liabilities or duties of citizens of a state without distinction as to the pursuit or calling is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objecton might with

equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce. In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating upon all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country."

In the case of Mondou v. Railroad Company, 223 U. S. 1, 32 Sup. Ct. Rep. 169, this Court said:

"True, prior to the present act, the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by Congress."

In the case of C. M. & St. P. Ry. Co. v. Solan, 169 U. S. 133, 18 Sup. Ct. Rep. 289, the effect of an Iowa statute which prohibited railroad companies from obtaining a release of their liability through any contract, receipt, etc., was upheld, even though the injury in question arose through the operation of the Railroad Company in interstate commerce.

The case of the Pennsylvania R. R. Co. v. Hughes, 191 U. S. 477, 24 Sup. Ct. Rep. 122, announces the same rule.

III.

Congress has passed no act concerning the responsibility of interstate carriers for personal injuries sustained by passengers or strangers, so that these matters still remain subject to the regulation of the several states.

The plaintiff in error claims that the Carmack Amendment has made the interpretation of every contract for interstate transportation of persons or property a Federal question. The defendant in error admits that by the Carmack Amendment Congress legislated upon the liability of an interstate carrier for the transportation of property only; that Congress having legislated on the liability of the carrier for the transportation of property all state decisions were immediately superseded in so far as they applied to interstate carriers' liability on account of the transportation of property, and that the determination of the validity and of the effect of every contract fixing, limiting or dealing with the liability of an interstate carrier for the transportation of property thenceforward became a Federal question.

The wording of the act affirmatively demonstrates that it has to do with but one thing, namely, the interstate transportation of property, and does not have anything to do with the interstate transportation of persons, nor with contracts for the leasing of equipment or the leasing of roads. (The italics are ours.)

> "That any common carrier, railroad, or transportation company receiving *property* for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading *therefor* and shall be liable to the lawful holder thereof for any loss, damage, or injury to such *property* caused by it or by any common carrier, railroad, or transportation company to which such *property* may be delivered, or over whose line or lines such *property* may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury, as it may be required to pay the owners of such *property*, as may be evidenced by any receipt, judgment, or transcript thereof."

Every interpretation that has been had by this court of that Act has restricted its application to interstate shipments of property. The case of Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. Rep. 155, dealt with a shipment of property, and, of course, there was no occasion to distinguish the effect of the contract upon the shipment of property, and the effect of the contract upon the transportation of individuals. The court, however, very distinctly and clearly outlined the entire scope of the Amendment. (The italics are ours.)

"The significant and dominating features of that amendment are these:

First. It affirmatively requires the initial carrier to issue 'a receipt or bill of lading therefor,' when it receives '*property for transportation* from a point in one State to a point in another.'

Second. Such initial carrier is made 'liable' to the lawful holder thereof for any loss, damage, or injury to such *property* caused by it.

Third. It is also made liable for any loss, damage, or injury to such *property* caused by any 'common carrier, railroad or transportation company to which such *property* may be delivered or over whose line or lines such property may pass.'

Fourth. It affirmatively declares that 'no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed.'

> Prior to that amendment the rule of carrier's liability, *for an interstate shipment of property,* as enforced in both Federal and State courts, was either that of the general common law as declared by this court and enforced in the Federal courts throughout the United States, Hart v. Pa. R. R., 112 U. S. 331; or that determined by the supposed public policy of a particular state, Pennsylvania R. R. v. Hughes, 191 U. S. 477; Railroad v. Sloan, 169 U. S. 133."

Again in the case of Boston & Maine R. R. v. Hooker, 233 U. S. 97, this Court again clearly calls attention to the limitations of the subject legislated upon by this Amendment.

> "Since the decision in the Hughes Case the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, has been passed, and this court has held that by virtue of that act (particularly Sec. 20, the Carmack Amendment) the *subject of intertsate transportation of property* has been regulated by Federal law to the exclusion of the power of the States to control in such respect by their own policy or legislation."

Again in the case of Southern Pac. Ry. Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. Rep. 524, Justice Pitney in his dissenting opinion calls particular attention to the distinction contended for in this case.

> "Until now Congress has passed no Act concerning their responsibilty for personal injuries sustained by pasengers or strangers, or for deaths resulting from such injures, so that these matters still remain subject to the regulation of the several states. We have recently held that the anti-pass provision of the Hepburn Act (34 Stat. at L. 584, 585, Chap. 3591, 1, Comp. Stat. 1916, Sec. 8563) does not deprive a party who accepts gratuitous carriage in interstate commerce with the consent of the carrier, in actual but unintentional violation of the prohibition of the Act, of the benefit and protection of the law of the State imposing upon the carrier a duty to care for his safety. Southern P. Co. v. Schuy-

ler, 227 U. S. 601, 612, 57 L. Ed. 662, 669, 43 L. R. A. (N. S.) 901, 33 Sup. Ct. Rep. 227."

In the case of Southern Pacific Co. vs. Schuyler, 227 U. S. 601, 33 Sup. Ct. Rep. 247, the contention was made in thia Court that Congress had so legislated upon interstate transportation of persons as to supersede all state laws governing the liability for injuries thus sustained. The plaintiff in that case was a railway mail clerk, and as such received a pass entitling him to transportation. He was injured in a wreck in the State of Utah while riding upon the transportation, but not while engaged in the course of his employment as a railway mail clerk. This Court held that there was no act of Congress regulating the liability of railroad companies for the transportaion of persons, and therefore that question was not a Federal question.

> "Whether the Hepburn Act prohibits a carrier from giving free interstate transportation to the employees of the railway mail service when they are not on duty, but are traveling for their own benefit or pleasure, is, of course, a Federal question.
>
> But whether—assuming that question to be answered in the affirmative—the relation of carrier and passenger arises in the case of gratuitous passage under such circumstances such as are presented in this case is (in the absence of an act of Congress regulating the matter) a question not of Federal but of State law."

The Court further stated that the carrier was bound by the local law:

> "The deceased no more forfeited his life, limb, or safety, and no more forfeited his right to the protection accorded by the local law to a passenger in his situation, than the carrier forfeited its right of property in the mail car upon which the deceased rode. His right to safe carriage was not derived, according to the law of Utah, from the contract made between him and the carrier, and therefore was not deduced from the supposed

violation of the Hepburn Act. It arose from the fact that he was a human being, of whose safety the plaintiff in error had undertaken the charge. With its consent he had placed his life in its keeping, and the local law thereupon imposed a duty upon the carrier, irrespective of the contract of carriage. The Hepburn Act does not deprive one who accepts gratuitous carriage, under such circumstances, of the benefit, and protection of the law of the State in this regard."

The opinion in the above case was followed by the District Court of the Western District of New York in the case of Wiley v. Grand Trunk Ry. of Canada, 227 Fed. 127. (The italics are ours.)

"Therefore the only issue raised by this motion is the validity of the release. If the plaintiff has been a gratuitous passenger, there is no doubt but that, under the decisions of the United States Supreme Court, the release would have been valid in the Federal courts, in the absence of wilful or wanton negligence, irrespective of the Hepburn Act. Northern Pac. Ry. Co. v. Adams, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513; Boering v. Chesapeake Beach Ry. Co., 193 U. S. 442, 24 Sup. Ct. 515, 48 L. Ed. 742. But the plaintiff would not have been a gratuitous passenger prior to the Hepburn Act, for the reason that the right to ride without special compensation was given in part consideration of the payment which was principally for other services; and although the plaintiff was being carried on a freight train at the time he sustained the injuries, he would, nevertheless, have been a passenger for hire, and entitled to protection as such, as incidental to the carriage of the stock under his care. Railroad Co. v. Lockwood, 17 Wall 357, 368, 21 L. Ed. 627; Railway Co. v. Stevens, 95 U. S. 655, 24 L. Ed. 535; Norfolk, Southern R. Co. v. Chatman, 222 Fed. 802; ——— C. C. A. ———. Hence we are brought to the vital question involved in this motion.

Has Congress, by the Hepburn Act, so called, regulated the invalidity of such a release as is this, to the exclusion of the law of the State? In my judgment it has not. The release does not offend either the letter or spirit of the interstate commerce legislation of Congress. The fourth paragraph of section 1 of the "Act to regulate commerce," as amended June 29, 1906, and in effect January 1, 1907 (Chap. 3591, 34 Stat. 584, 585), especially excepts from the anti-pass provisions of the law 'necessary caretakers of live stock,' and this provision is not varied or affected by the subsequent amendments of April 13, 1908 (Chap. 143, 35 Stat. 60, 61), and June 18, 1910 (Chap. 309, 36 Stat. 546). This view of the statute is confirmed by a very recent decision of the Circuit Court of Appeals for the Fourth Circuit in Norfolk Southern R. Co. v. Chatman, 222 Fed. 802, ——— C. C. A., *supra*. That case involved substantially the same facts as exist here, in which it was held that a caretaker of live stock, who was transported on his shipping contract, did not come within the statute in question, but was a passenger for hire, and that a release similar to the one herein issued was invalid.

The plaintiff's right to safe carriage and the question whether the relation of passenger and carrier exists in the absence of any federal statute regulating the matter are therefore matters of state law. Southern Pac. Co. v. Schuyler, 227 U. S. 601, 33 Sup. Ct. 277, 57 L. Ed. 662, 43 L. R. A. (N. S.) 901. So that the ultimate question is: Waht is the state law which influences the validity or invalidity of the release? The weight of authority including the United States Supreme Court and the Circuit Court of Appeals for the Second Circuit, is that the invalidity of a release like this is to be determined by the law of the jurisdiction where the carriage was comenced—locus celebrationis—whether the basis of the carier's liability be regarded as contractual or tortious The general rule that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, un-

less the parties at the time of making it have some other law in view, requires a contract of carriage, made in one country, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country. The contract in such cases is single, and the performance is one continuous act. Davis v. Chicago, Milwaukee & St. Paul Ry. Co., 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. Rep. 835; Brockway v. American Express Co., 171 Mass. 257, 47 N. E. 87; Brockway v. American Express Co., 171 Mass. 159, 50 N. E. 626; Hale v. N. J. Steam Navigation Co., 15 Conn. 539, 39 Am. Dec. 398; Dyke v. Erie Ry. Co., 45 N. Y. 113, 117, 6 Am. Rep. 43; Fish v. Delaware, Lackawanna & eWstern R. R. Co., 211 N. Y. 374, 105 N. E. 661; Liverpool Steam Ca. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; The Majestic, 60 Fed. 624, 9 C. C. A. 161, 23 L. R. A. 746 (C. C. A. 2d Cir.)."

It therefore follows that if Congress has not legislated upon the liability of an interstate carrier for injury to persons other than its employees, that whatever decision the Supreme Court of Nebraska may have made is not subject to the review of this Court.

IV.

Even if it should be determined that Congress in passing the Carmack Amendment had legislated upon a liability of interstate carriers to persons for injuries received in transportation, nevertheless the local law of Nebraska would apply in this case.

(a) Because the contract of the Railway Company in this case is not a contract for transportation but a contract leasing equipment.

(b) Because the defendant in error by his agreement only released the company from his rights as a passenger, and

(c) Because in transporting circus outfits the Railway Company is not a common carrier.

(a) THE CONTRACT IN QUESTION IS A CONTRACT FOR THE LEASING OF EQUIPMENT, AND NOT A CONTRACT FOR TRANSPORTATION.

The Railway Company and Circus Company in making the contract in question were very particular to so word the contract as to prevent it being construed as a contract for transportation. In the third inducement clause at the beginning of the contract it is stated:

> "Whereas the second party desires to enter into an agreement with the first party for the use of its roadbed and tracks and the necessary engines, engineers and other employes of the first party, for the purpose of moving said cars, equipment and employes of the second party from point to point where performances are to be given on the line of the railroad of the party of the first party."

In the first paragraph of the agreement itself the Railway Company agrees as follows:

> "The first party agrees to furnish to and for the use of the second party the necessary locomotive engines with the necessary fuel therefor, and the engineers, firemen and other employees, and the right to use its tracks for the transportation of said circus * * * "

Further on in the agreement we find another paragraph which again declares this is not a contract for transportation:

> "It is expressly agreed and understood that this agreement is not made by the first party as a common carrier, but only as a *hiring* of said locomotives, engines and employes and the use of its railroad to the second party for the purpose of enabling the second party to

move said train between said points; that all of said cars, coaches and trains shall be operated under the management, direction, orders and control of the second party or its agents."

"It is expressly understood and agreed that all engineers, firemen, conductors and brakemen, train despatchers, and other operators and employes furnished by the first party, are in the operation and movement of said cars, coaches and trains, exclusively the employes of the second party * * * "

These excerpts from the contract show beyond possibility of question that the Railway Company did not enter into a contract as either a private carrier, or as a common carrier. These excerpts conclusively show the purpose of both contracting parties was to have possession of the circus trains, at all times remain in the circus company.

Furthermore, when this action was instituted in the District Court of Douglas County, Nebraska, the plaintiff in error in its answer specifically denied that it was engaged in the transportation of the circus trains, and affirmatively alleged that this train was in the possession, under the control of, and being moved by the circus company. Paragraph 2 of the Answer, page 10 of the record: (The italics are ours.)

"This defendant specifically denies that at the time of said collision and consequent injury to the plaintiff, if he was injured, plaintiff was being transported by this defendant *as a passenger for hire or in any other capacity*, and in that behalf, alleges the fact to be, as will be hereinafter more specifically set forth, that *at said time said plaintiff was being transported by said Barnum & Bailey Shows;* defendant specifically denies that the train upon which plaintiff was riding at the time of said collision and at the time at which he received his injuries, if any he did receive, was in charge of this defendant or its agents, servants and employes, or was

being operated by or was in control of this defendant or its agents, servants and employes."

At the trial of the case in the District Court of Douglas County, Nebraska, that court sustained the contention of the plaintiff in error in this respect and specifically held that the circus train was being operated by the employes of the circus company, and that the train was not being transported by the Railway Company and was not in the possession of the Railway Company. We call the Court's attention to the last paragraph of Instruction No. 3, page 38 of the record:

> "In this behalf you are instructed that in so far as the first contract herein mentioned provided that the agents, servants, and employes furnished by the defendant to the circus company and engaged in the operation and movement of said trains and cars in the transportation of said circus company's property and employes at the time referred to, were to be regarded as exclusively the employes of the circus company, except the said cars and train should be run according to the rules, regulations and time card of said defendant, the same may be considered by you as valid and binding between the parties, in so far as this particular action is concerned, and you may therefore assume as a fact conclusively established that the employes aforesaid were, at all times referred to as the servants and employes of the said circus company exclusively and not those of the defendant and that therefore their acts while so employed in the management, operation and control of said circus train, would be the acts of the circus company and not those of the defendant herein, and any negligence, if any there was, on the part of the said agents or employes of said circus train will not be attributable to the defendant railway company."

If there was error in the giving of this instruction and in this holding by the District Court of Douglas County, it was

an error of which plaintiff in error cannot now complain.

The Supreme Court of Nebraska in reviewing the case stated that it would not decide whether this construction of the contract was right for the reason that the Railway Company which was seeking a reversal of the case had not been prejudiced thereby. That court said (page 251 of record):

> "The trial court took the view that the crew of the circus train might be regarded as the employes of the circus company and charged the jury that plaintiff could not recover unless his injuries were due to the negligence of the crew operating the other train. By his instructions he denied plaintiff the right to recover under the law of Nebraska fixing the liability of a common carrier to a passenger. Without deciding that the contract may be given this broad and liberal construction, suffice it to say, that in view of the verdict rendered and the condition of the record neither party has been prejudiced. Independently of plaintiff's rights as as passenger, if any he had, he was lawfully upon defendant's tracks and was injured by its negligence. The trial court gave the contract full force in that it recognized defendant's claim to the private character of the transportation and plaintiff's renunciation of his rights as a passenger, and limited the recovery to an affirmative showing of negligence upon the part of the passenger crew."

It therefore clearly follows that no matter what interpretation may be placed by this court upon the Carmack Amendment, that Amendment has no application to the instant case for the reason that the instant case is not a contract for transportation of either persons or property.

(b) THE DEFENDANT IN ERROR ONLY RELEASED HIS RIGHTS AS A PASSENGER.

There are many clauses in the contract releasing from liability the Ringling Bros. These clauses release Ringling Bros. from quite a variety of liability, but there is only one

clause that purports to release the railroad company, and that is in the following language:

> "And second party, recognizing said privity in railroad transportation, hereby renounces his rights as 'Passenger' in traveling on any railroad line while in said service, and releases all such railroad companies from claim on his part for any damage or injury whatsoever."

There is, however, a recital which precedes the above stipulation that the employes know,

> "That said first party contracts with railway lines over whose tracks they travel, to save transportation companies harmless, even for gross negligence, from any and all claims, demands and damages of employes of first party, and especially second party herein."

It seems to be the theory of plaintiff in error that the foregoing recital of knowledge, followed by the stipulation containing the words "recognizing said privity," creates a privity of relation between the plaintiff and the railroad company. This requires us to ascertain the true meaning of the word "privity" as used in this contract. "Privity" is often defined as "mutual or successive relationship to the same rights of property." See Words and Phrases, both series.

> "The ground of privity is property, and not personal relation."
>
> 4 Bigelow on Estoppel 142.

These definitions and authorities concur in the thought that "privity" used in this sense has relation to property and has nothing to do with personal relation, but the theory of appellant would make it applicable to a personal relation solely.

Since the definiton of "privity" applicable to property cannot be the true definition of the term as used in this con-

tract, we must look elsewhere for the meaning of the term. Webster's first definiton is "privacy," and his first definition of private is "Belonging to, or concerning, an individual person, company, or interest; peculiar to one's self; unconnected with others; not public; not general, separate; etc."

Then there is the recital marked (d) "That such contract between Railway Company as private carrier and first party, furnishes the opportunity of employment of second party."

All of the foregoing shows conclusively that the word "privity" in this contract was not used in the sense of one party being privy to the rights of the contracts of another, but was used as descriptive of the kind of transportation for which the circus company was contracting with the railroad companies. Bearing this in mind, and using the definition of "privity" instead of the word itself, in the clause undertaken to release railroad companies from liability, it will read as follows:

> "And second party, recognizing the private character of such railroad transportation as distinguished from common or public transportation, hereby renounces his rights as 'Passenger' in traveling on any railroad line while in said service, and releases all such railroad companies from claim on his part for any damage or injury whatsoever."

Now what is the significance of the recital that the plaintiff recognizes the private character of the transportation and that he renounces his rights as a "passenger?" If it be said that the concluding words wherein he undertakes to release railroad companies "from claim on his part for any damage or in jury whatsoever" operates as a release of any and every sort of claim, whether arising through the relation of passenger or otherwise, then the recital that he recog-

nizes the private character of the transportation, and the declaration that he renounces his status as a passenger, are neither more nor less than mere incantation. On the other hand, if we are to apply the rule that every word and phrase shall be considered as significant and to have been used for some purpose, and if we attribute any significance whatsoever to the plaintiff's renunciation of his status as a passenger, we can only do that by concluding that his release of claim for damages was a release only of such claims as would depend upon the status of a passenger.

The plaintiff can very well afford to concede the validity of this contract if it be interpreted as releasing the railroad company only from such claims as depend upon the existence of the status of "Passenger." Railroad companies sometimes become liable for claims that do not arise out of the relation of carrier and passenger and there is a liability in this case entirely independent of the relation of carrier and passenger.

(c) IF THE RAILROAD COMPANY WAS TRANSPORTING THE CIRCUS TRAIN IT WAS DOING SO AS A COMMON CARRIER AND NOT AS A PRIVATE CARRIER.

It is not denied by the defendant in error that a number of decisions may be found in which it is held that a railway company, in transporting a circus outfit, is a private carrier and not a common carrier. It is not claimed by defendant in error that these decisions, or at least some of them, have been incorrectly stated. It was a fact in early railroad transportation that the carriers did not hold themselves out as being in the business of receiving and moving private equipment, and for a long time it would probably have been just to have refused to compel carriers to undertake the transportation of such equipment, but that time is long past,

and if the reason for this rule has passed then the rule itself should be discontinued.

For the past fifty years every railroad company in the United States of any size has yearly moved a great number of these circus trains. There is no reason why a railroad company is not equally a common carrier of a circus car as well as an oil tank car, no reason why a railroad company is less a common carrier of a circus car than it is of a car of meat, or of fruit, a car of explosives, or any other of a thousand different kinds of goods, which there was a time when the railroad company was not able to transport. A rule of law should not be arbitrarily continued and applied when the reason which called it into existence has vanished.

The Interstate Commerce Commission has been compelled to adopt this rule. In the case of Chappelle v. Louisville & Nashville R. R. Co., 19 I. C. C. 456 and 457, Commissioner Lane said:

> "We do not doubt the powers of the Commission to regulate the rates imposed by carriers upon the movement of private equipment.
>
> This was said advisedly and with full appreciation of the cases decided by the courts holding that as to the movement of circus companies a railroad was a private carrier. No decision has been rendered since the act to regulate commerce holding that as to the transportation of private cars containing theatrical companies a railroad company could class itself as a private carrier which may lawfully discriminate in the transportation service which it furnishes.
>
> A railroad makes the carriage of goods or persons a business and holds itself out to the public as ready and willing to carry 'indifferently for all persons any particular class of goods or goods of any kind whatever.' We cannot recognize the right of the defendant to claim exemption from this provision of this law as to any service which it renders as a carrier of persons or prop-

erty. If it is a private carrier as to private cars or any class of private cars, it may carry such cars free of charge or at any rate it may choose, differning and distinguishing betwen each party or car that it carries. Such construction of the law absolutely nullifies it as to all private equipment, whether carrying passengers or freight. A carrier may no doubt lawfully refuse to carry certain classes of private equipment, but it may not distinguish between private cars that are owned by negroes and private cars that are owned by whites, nor may it discriminate between private cars that are owned by Armour & Company and private cars of the same class that are owned by any other concern."

CONCLUSION.

For the reasons hereinbefore stated the defendant in error respectfully submits that this proceeding in error should be dismissed, or in lieu thereof judgment of the Nebraska Court affirmed.

Respectfuly submitted,

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